

No. 12627

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United States  
Court of Appeals  
for the Ninth Circuit.

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PARK-IN-THEATRES, INC., a Corporation,  
Appellant.

vs.

SETH D. PERKINS, GEORGE E. MITZEL,  
LaVERE CO., a Corporation and DRIVE-IN-  
THEATRES OF AMERICA, a Corporation,  
Appellees.

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Transcript of Record  
In Two Volumes

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Volume I  
(Pages 1 to 162)

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PAUL P. O'BRIEN,  
CLERK

Appeal from the United States District Court,  
Southern District of California,  
Central Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court Southern District of California, Central Division.

Civil Action No. 8582-R

For Infringement of United States Letters Patent No. 1,909,537.

PARK-IN THEATERS, INC.,

Plaintiff,

vs.

SETH D. PERKINS, GEORGE E. MITZEL, LA VERE CO., a California corporation, and DRIVE-IN THEATRES OF AMERICA, a California corporation,

Defendants.

### COMPLAINT

For its complaint against defendants, plaintiff alleges the following:

(1) Plaintiff is a New Jersey corporation having its place of business at 840 Cooper Street, Camden, N. J.

2-a) Seth D. Perkins, one of the defendants, is a citizen of California and an inhabitant of this District and Division.

2-b) George E. Mitzel, one of the defendants, is a citizen of California and an inhabitant of this District and Division. [2]

2-c) La Vere Co., one of the defendants, is a California corporation and an inhabitant of this District and Division.

2-d) Drive-in Theatres of America, one of the defendants, is a California corporation and an inhabitant of this District and Division.

(3) This Court has jurisdiction over the subject matter, under the patent laws of the United States, and this Court has jurisdiction over the defendants under Section 48 of the Judicial Code (28 USC 109).

(4) On May 16, 1933, Letters Patent No. 1,909,537, of the United States were duly and legally issued to one Richard M. Hollingshead, Jr., for an invention in Drive-In Theatres;— which patent is hereby proffered.

(5) By an assignment executed on the 1st day of June, 1933, and recorded in the Transfers of Patent of the United States Patent Office on the 11th day of August, 1933, in Liber F-157, at page 135, the entire right, title and interest in and to said Letter Patent No. 1,909,537 were assigned by said Richard M. Hollingshead, Jr., to plaintiff, and by said assignment plaintiff became and has continued to be and now is the sole and exclusive owner of all right, title and interest in and to said patent and all claims arising or that may have arisen or accrued from infringement thereof, from and after the date of issuance of said patent.

(6) The drive-in theatre invented by Richard M. Hollingshead, Jr. and forming the subject-matter of plaintiff's Hollingshead patent No. 1,909,537 was entirely unknown and unanticipated [3] in the United States, or elsewhere, prior to the time when

Richard M. Hollingshead, Jr., invented such drive-in theatre, and such invention by Richard M. Hollingshead, Jr. constituted and now constitutes an original inventive contribution of great value and benefit to the public at large, and the public has recognized the merit of said invention by patronizing, to an ever increasing extent, the drive-in theatres embodying such invention, many of which have been built and constructed and used throughout the United States, solely and directly as a result of said invention having been made by Richard M. Hollingshead, Jr. and having thus been made available to the public.

(7) The individual defendants named in paragraphs 2-a and 2-b combined and conspired with each other and with others not now known to plaintiff,

whose identity plaintiff prays leave to ascertain with the aid of the Rules of Civil Procedure relating to discovery and to add hereto when so ascertained,

to appropriate the invention of plaintiff's patent 1,909,537 within this District and Division and elsewhere in the United States, all without license from plaintiff and in violation and infringement of plaintiff's rights in and under its patent 1,909,537 and, as a part of said combination and conspiracy, said individual defendants and said others, made or caused to be made and built or caused to be built and sold or caused to be sold and used or caused to be used drive-in theatres embodying the invention of plaintiff's patent 1,909,537, within this District and Division, and elsewhere in the United States,



within the past six years prior to the filing of this complaint. [4]

(8) The individual defendants named in paragraphs 2-a and 2-b caused the corporate defendants to be incorporated under the laws of the State of California and said individual defendants are all stockholders, directors and officers of said corporate defendants.

(9) The corporate defendants were formed for the purpose of carrying on the infringements herein complained of and said corporate defendants have had no business other than and have no business other than building and/or operating and/or selling drive-in theatres in infringement of plaintiff's patent 1,909,537, and in connection with its said business, they are and merely act as the alter ego of the aforesaid individual defendants and have only such functions in and about or pertaining to the building, operation or sale of such drive-in theatres as are or may be assigned to them, or vested in them, from time to time, by the individual defendants, and said individual defendants control, direct and determine the policies and actions of said corporate defendants, and said corporate defendants were formed by said individual defendants as a cloak for the purpose of committing, through said corporate defendants, some or all of their acts of infringement within this District and Division and elsewhere in the United States, herein complained of, and for the purpose of avoiding responsibility for such infringements, and individual defendants use said corporate

defendants as conduits through which to receive, from the public, the proceeds of their infringements within this District and Division and elsewhere in the United States, and to withdraw and disperse to themselves all assets and profits thereof; thereby to leave said corporate defendants unable to respond to any judgment for patent infringement; said individual defendants being the real parties in [5] interest in the drive-in theatres herein complained of as infringements of plaintiff's patent 1,909,537.

(10) Since the issuance of plaintiff's patent 1,909,537 and within the past six years and prior to the filing of this complaint, defendants made or caused to be made and built or caused to be built and sold or caused to be sold and used or caused to be used a drive-in theatre at Jefferson Street and Sepulveda Boulevard in Los Angeles, California and on Mount Vernon Street near Mill Street in San Bernardino, California, and elsewhere within this District and Division and elsewhere within the United States.

(11) The drive-in theatres referred to in foregoing paragraph 10 were and are and are planned to be in accordance with and embody the invention disclosed in plaintiff's patent 1,909,537 and claimed in claims 2, 4, 5, 6, 10, 15, 16 and 19 of plaintiff's patent 1,909,537.

(12) The acts set forth in foregoing paragraph 10 have constituted and now constitute infringements of one or more of claims 2, 4, 5, 6, 10, 15, 16 and 19 of plaintiff's patent 1,909,537.



(13) Defendants plan and intend to continue making, building, using, operating and selling of the aforesaid drive-in theatres and plan and intend to build, operate and sell other similar drive-in theatres.

(14) Plaintiff has marked and caused to be marked drive-in theatres according to plaintiff's patent 1,909,537 with notice of said patent 1,909,537, under and in accordance with Section 4900 [6] of the Revised Statutes of the United States (35 U.S.C. 49).

(15) Plaintiff has given defendants actual notice of infringement prior to the filing of this complaint.

(16) Plaintiff has been greatly and irreparably damaged and injured in its patent rights under its patent 1,909,537 here in suit, and in its business thereon and appurtenant thereto, by reason of defendants' aforesaid infringements of the patent here in suit, and the defendants have correspondingly profited by such infringements, which damage and injury to plaintiff has been aggravated by the wilful, open and defiant character of defendants' infringements.

(A) Wherefore plaintiff prays that defendants be required to pay to plaintiff treble such damages as plaintiff has sustained in consequence of defendants' infringements herein complained of, including general damages, and for a jury trial to determine such damages, including general damages, and that plaintiff have judgment for treble the amount of

such damages found by the jury and for the amount of plaintiff's reasonable attorney's fees, and for interest on said damages from the date of infringement, and for the cost of this suit to be assessed against defendants.

(B) Plaintiff requests a trial by jury of all issues presented by the foregoing complaint and by defendants' answers thereto, going to defendants' liability and to the amount of such liability. [7]

(C) Plaintiff further prays for a permanent injunction against defendants and each of them, enjoining them and their agents and employees (and all those in active concert with them) from further infringing plaintiff's patent 1,909,537.

LYON & LYON,

/s/ LEONARD S. LYON,

/s/ REGINALD E. CAUGHEY,  
Attorneys for Plaintiff.

/s/ LEONARD L. KALISH,  
Counsel for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed August 27, 1948. [8]

[Title of District Court and Cause.]

INTERROGATORIES PROPOUNDED BY DEFENDANTS PURSUANT TO RULE 33 OF THE RULES OF CIVIL PROCEDURE TO BE ANSWERED SEPARATELY AND FULLY IN WRITING UNDER OATH WITHIN FIFTEEN DAYS

1. Specifically state the location of each drive-in theatre referred to in paragraph 7 of the complaint and alleged to have been made and built by the individual defendants named in paragraphs 2-a and 2-b of the complaint, and in your answer specify the street address, name of town or city, county and state of each such drive-in theatre.

2. Specifically state the location of each drive-in theatre referred to in paragraph 7 of the complaint and alleged [9] to have been caused to be built and made by the individual defendants named in paragraphs 2-a and 2-b of the complaint, and in your answer specify the street address, name of town or city, county and state of each such drive-in theatre.

3. Specifically state the location of each drive-in theatre referred to in paragraph 7 of the complaint and alleged to have been sold by the individual defendants named in paragraphs 2-a and 2-b of the complaint, and in your answer specifically state:

a—the address of such theatre, specifying the street number, the name of the street, the name of the city or town, the county and state;

b—to whom sold;

c—the date upon which sold;

d—the date upon which such theatre was built.

4. Specifically state the location of each drive-in theatre referred to in paragraph 7 of the complaint and alleged to have been used by the individual defendants named in paragraphs 2-a and 2-b of the complaint, and in your answer specify the street address, name of town or city, county and state of each such drive-in theatre.

5. Specify, for each drive-in theatre referred to in paragraph 7 of the complaint and alleged to have been built by the individual defendants named in paragraphs 2-a and 2-b of the complaint,

a—the date upon which such theatre was erected;

b—the date upon which such theatre was completed;

c—the date upon which such theatre was placed in operation. [10]

6. Specify, for each drive-in theatre referred to in paragraph 7 of the complaint and alleged to have been sold by the individual defendants named in paragraphs 2-a and 2-b of the complaint,

a—the date upon which such theatre was erected;

b—the date upon which such theatre was completed;

c—the date upon which such theatre was placed in operation.

7. Specify, for each drive-in theatre referred to in paragraph 7 of the complaint and alleged to have been used by the individual defendants named in paragraphs 2-a and 2-b of the complaint,

a—the date upon which such theatre was erected;

b—the date upon which such theatre was completed;

c—the date upon which such theatre was placed in operation.

8. Specifically state the location of each drive-in theatre referred to in paragraph 9 of the complaint and alleged to have been built by defendant Drive-In Theatres of America and in your answer specify,

a—the street number, the name of the street, the name of the town or city, the county and the state;

b—the date upon which each such theatre was built.

9. Specifically state the location of each drive-in theatre referred to in paragraph 9 of the complaint and alleged to have been sold by defendant Drive In Theatres of America and in your answer specify—

a—the street number, the name of the [11] street, the name of the town or city, the county and the state;

b—the date upon which each such theatre was erected;

c—the date upon which each such theatre was completed;



d—the date upon which each such theatre was placed in operation;

e—the person, firm, or corporation to whom such theatre was sold;

f—the date upon which such theatre was sold.

10. Specifically state the location of each drive-in theatre referred to in paragraph 9 of the complaint and alleged to have been operated by defendant Drive In Theatres of America, and in your answer specify—

a—the street number, the name of the street, the name of the town or city, the county and the state;

b—the date upon which each such theatre was built;

c—the date upon which each such theatre was place in operation.

11. With reference to the theatre located at Jefferson Street and Sepulveda Boulevard, at Los Angeles, referred to in paragraph 10 of the complaint, specify which one of the defendants named in the complaint—

a—built said theatre;

b—sold said theatre;

c—to whom sold;

d—used said theatre.

12. With reference to the theatre located on Mt. Vernon Street near Mill Street in San Bernardino, California, referred [12] to in paragraph 10 of the

complaint, specify which one of the defendants named in the complaint—

a—built said theatre;

b—sold said theatre;

c—to whom sold;

d—used said theatre.

Dated at Los Angeles, California, this 27th day of September, 1948.

/s/ C. A. MIKETTA,

JOHNSON & LADENBERGER,

By DON A LADENBERGER,

Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed September 28, 1948. [13]

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[Title of District Court and Cause.]

### STIPULATION

It Is Stipulated, by and between counsel for the respective parties, that the plaintiff in the above-entitled action may have up to and including October 18, 1948, within which to answer or object to the Interrogatories heretofore propounded by the defendants. The defendants shall have twenty (20) days after the sustaining of any objections to said Interrogatories or twenty (20) days after the filing

of answers thereto within which to answer or otherwise plead to the Complaint.

LYON & LYON,

/s/ REGINALD E. CAUGHEY,  
Attorneys for Plaintiff.

/s/ C. A. MIKETTA,  
Attorney for Defendants.

It Is So Ordered this 13th day of October, 1948.

/s/ PAUL J. McCORMICK,  
Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed October 13, 1948. [15]

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[Title of District Court and Cause.]

PLAINTIFF'S ANSWER TO  
INTERROGATORIES

Now comes plaintiff and answers defendants' interrogatories served September 28, 1948, as follows:

1. Answering Interrogatory 1, plaintiff states that the drive-in theatres referred to in paragraph 7 of the Complaint and alleged to have been made and built by the individual defendants named in paragraphs 2-a and 2-b of the Complaint are, inter alia, those identified in paragraph 10 of the Complaint. Plaintiff states, on information and belief, that other drive-in theatres have also been made and



built by defendants, the locations of which are presently unknown to plaintiff but are within the knowledge of defendants. [16]

2. Answering Interrogatory 2, plaintiff states that the drive-in theatres referred to in paragraph 7 of the Complaint and alleged to have been caused to be built and made by the individual defendants named in paragraphs 2-a and 2-b of the Complaint are, inter alia, those identified in paragraph 10 of the Complaint. Plaintiff states, on information and belief, that other drive-in theatres have also been caused to be built and made by defendants, the location of which are presently unknown to plaintiff but are within the knowledge of defendants.

3. Answering Interrogatory 3, plaintiff states that the drive-in theatres referred to in paragraph 7 of the Complaint and alleged to have been sold by the individual defendants named in paragraphs 2-a and 2-b of the Complaint are, inter alia, those identified in paragraph 10 of the Complaint. Plaintiff states, on information and belief, that other drive-in theatres have also been sold by defendants, the location of which are presently unknown to plaintiff but are within the knowledge of defendants. Plaintiff is presently uninformed as to the information requested by sub-sections b, c and d of Interrogatory 3 but states, on information and belief, that said information is within the knowledge of defendants.

4. Answering Interrogatory 4, plaintiff states that the drive-in theatres referred to in paragraph 7

of the Complaint and alleged to have been used by the individual defendants named in paragraphs 2-a and 2-b of the Complaint are, inter alia, those identified in paragraph 10 of the Complaint. Plaintiff states, on information and belief, that other drive-in theatres have also been used by defendants, the location of which are presently unknown to plaintiff but are within the knowledge of defendants.

5. Answering Interrogatory 5, plaintiff states that the drive-in theatres referred to in paragraph 7 of the Complaint and alleged to have been built by the individual defendants named in [17] paragraphs 2-a and 2-b of the Complaint are, inter alia, those identified in paragraph 10 of the Complaint. Plaintiff states, on information and belief, that other drive-in theatres have also been built by defendants, the location of which are presently unknown to plaintiff but are within the knowledge of defendants. Plaintiff is presently uninformed as to the information called for by sub-sections a, b and c of Interrogatory 5 but states, on information and belief, that said information is within the knowledge of defendants.

6. Answering Interrogatory 6, plaintiff states that the drive-in theatres referred to in paragraph 7 of the Complaint and alleged to have been sold by the individual defendants named in paragraphs 2-a and 2-b of the Complaint are, inter alia, those identified in paragraph 10 of the Complaint. Plaintiff states, on information and belief, that other drive-in theatres have also been sold by defendants, the

location of which are presently unknown to plaintiff but are within the knowledge of defendants. Plaintiff is presently uninformed as to the information called for by sub-sections a, b and c of Interrogatory 6 but states, on information and belief, that said information is within the knowledge of defendants.

7. Answering Interrogatory 7, plaintiff states that the drive-in theatres referred to in paragraph 7 of the Complaint and alleged to have been used by the individual defendants named in paragraphs 2-a and 2-b of the Complaint are, inter alia, those identified in paragraph 10 of the Complaint. Plaintiff states, on information and belief, that other drive-in theatres have also been used by defendants, the location of which are presently unknown to plaintiff but are within the knowledge of defendants. Plaintiff is presently uninformed as to the information called for by sub-sections a, b and c of Interrogatory 7 but states, on information and belief, that said information is within the knowledge of defendants. [18]

8. Answering Interrogatory 8, plaintiff states that the drive-in theatres referred to in paragraph 9 of the Complaint as having been built by defendant Drive In Theatres of America are, inter alia, those identified in paragraph 10 of the Complaint. Plaintiff states, on information and belief, that other drive-in theatres have been built by said defendant, the locations of which are presently unknown to plaintiff but are within the knowledge of defendants. Except as specified above, plaintiff is presently without information as to the facts called

for by subsections a and b but states, on information and belief, that said information is within the knowledge of defendants.

9. Answering Interrogatory 9, plaintiff states that the drive-in theatres referred to in paragraph 9 of the Complaint as having been sold by defendant Drive In Theatres of America are, inter alia, those identified in paragraph 10 of the Complaint. Plaintiff states, on information and belief, that other drive-in theatres have been sold by said defendant, the locations of which are presently unknown to plaintiff but are within the knowledge of defendants. Except as specified above, plaintiff is presently without information as to the facts called for by sub-sections a to f but states, on information and belief, that said information is within the knowledge of defendants.

10. Answering Interrogatory 10, plaintiff states that the drive-in theatres referred to in paragraph 9 of the Complaint as having been operated by defendant Drive In Theatres of America are, inter alia, those identified in paragraph 10 of the Complaint. Plaintiff states, on information and belief, that other drive-in theatres have been operated by said defendant, the locations of which are presently unknown to plaintiff but are within the knowledge of defendants. Except as specified above, plaintiff is presently without information as to the facts called for by sub-sections a, b and c but states, on information and [19] belief, that said information is within the knowledge of defendants.



11. Answering Interrogatory 11, plaintiff states that it is presently without knowledge as to the information called for by sub-sections a, b, c and d but states, on information and belief, that said information is within the knowledge of defendants.

12. Answering Interrogatory 12, plaintiff states that it is presently without knowledge as to the information called for by sub-sections a, b, c and d but states, on information and belief, that said information is within the knowledge of defendants.

PARK-IN THEATRES, INC.,

By /s/ W. W. SMITH,  
President.

State of Pennsylvania,  
County of Philadelphia—ss.

Before me, a notary public in and for the state and county aforesaid, on this 11th day of October, 1948, personally appeared W. W. Smith, who, being to me personally known, and having been by me first duly sworn, did depose and say that the facts set forth in the foregoing instrument are true to the best of his knowledge and belief.

[Seal]      /s/ E. K. MOEDERN,  
Notary Public.

My commission expires Jan. 2, 1949.

Receipt of copy acknowledged.

[Endorsed]: Filed October 18, 1948. [20]

[Title of District Court and Cause.]

PLAINTIFF'S INTERROGATORIES PRO-  
POUNDED TO DEFENDANTS UNDER  
RULE 33 TO BE ANSWERED SEPA-  
RATELY AND FULLY BY EACH AND  
EVERYONE OF THE DEFENDANTS IN  
WRITING UNDER OATH WITHIN  
FIFTEEN DAYS

A. State the name and address (city or town, street and number) of each and every drive-in theatre which has, at any time, been made or caused to be made and built or caused to be built and sold or caused to be sold and/or used or caused to be used or leased, rented or licensed, directly or indirectly, by any of the defendants, of the type exemplified by the drive-in theatres referred to in paragraph 10 of the Complaint. [21]

B. As to each and every one of the drive-in theatres referred to in Interrogatory A, state separately the following:

(1) The name or names of the particular defendants who, at any time have, directly or indirectly, participated in, or who have or have had any interest in, the making, building, selling, using, leasing, renting, or licensing of the drive-in theatre, giving the character and extent of interest of each, from time to time;

(2) If the land on which the drive-in theatre is built was purchased for the purpose of building the

drive-in theatre, give the date upon which such purchase was made;

(3) If the land on which the drive-in theatre is built was leased for the purpose of building the drive-in theatre, give the date upon which such lease was made;

(4) The date upon which the construction of the drive-in theatre was begun;

(5) The date upon which the construction of the drive-in theatre was completed;

(6) The name and address of each corporation, firm or individual who participated in the building of the drive-in theatre in the capacity of architect, designer, engineer, builder, contractor, sub-contractor, owner, lessor, lessee, licensor, licensee, or any supervisory capacity;

(7) If the drive-in theatre was ever sold, give the date of each and every sale, the names and addresses of each and every seller and purchaser, and the selling price and all other monetary terms and/or consideration involved therein; [22]

(8) If the drive-in theatre was ever leased, give the date of each and every lease, the names and addresses of each and every lessor and lessee, and all monetary terms and considerations of the lease;

(9) The beginning and ending dates of all periods of operation of the drive-in theatre;

(10) The name and address of each owner and

part-owner (past or present) of the land upon which the drive-in theatre is built, when and since first purchased for that purpose;

(11) The name and address of each corporation, firm or individual which has at any time operated the drive-in theatre and the names and addresses of all stockholders, corporate officers and/or the firm-members of each such operator;

(12) The name and address of each corporation, firm or individual which has at any time managed the drive-in theatre and the names and addresses of all stockholders, corporate officers and/or the firm-members of each such manager;

(13) The total box-office receipts, exclusive of amusement taxes paid on admissions, by week or month, of the drive-in theatre;

(14) The total operating expenses, by week or month, fully itemized and classified, of the drive-in theatre;

(15) The total payments, by week or month, made to or received by each corporate officer and/or firm-member, as an individual, by way of salary, commission, rent, royalty, dividends and/or any other form of remuneration or profit-sharing of [23] any kind whatever;

(16) If the drive-in theatre has, at any time, been built or operated under license or assignment or other right under any unexpired United States Letters Patent, give the number of the patent, the beginning and ending dates of the license or assign-



ment or other patent right, and the amounts, by week or month, paid under such license or assignment or other patent right, by way of royalty, rental, lease or any other form of remuneration or compensation.

LYON & LYON,

By /s/ REGINALD E. CAUGHEY,  
Attorneys for Plaintiff.

/s/ LEONARD L. KALISH,  
Counsel for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed October 18, 1948. [24]

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[Title of District Court and Cause.]

ANSWER OF DEFENDANT SETH D.  
PERKINS TO PLAINTIFF'S INTER-  
ROGATORIES

Defendant Seth D. Perkins states that he does not understand and is without knowledge as to what is meant by a drive-in theatre "of the type exemplified by the drive-in theatre referred to in Paragraph 10 of the Complaint" to which Interrogatories A and B are directed and is therefore unable to answer Interrogatories A and B.

Defendant Seth D. Perkins further states on information and belief that the interrogatories are propounded in bad faith and in a manner to unreasonably annoy, harass and oppress the defendant

and subject the defendant to unnecessary expense and investigations; that the interrogatories are excessive, burdensome and irrelevant and answers thereto, even if known to [25] defendant, would not be admissible; that plaintiff has admitted that plaintiff does not know who built, sold or used theatres specified in Paragraph 10 of the Complaint and such admission is proof that the Complaint against defendant is sham, frivolous, false and not in good faith.

/s/ SETH D. PERKINS.

State of California,  
County of Los Angeles—ss.

Before me, a Notary Public in and for the State and County aforesaid, on this 27th day of October, 1948, personally appeared Seth D. Perkins, who, being to me personally known, and having been by me first duly sworn, did depose and say that the facts set forth in the foregoing instrument are true to the best of his knowledge and belief.

[Seal] /s/ MYRTLE JOHNSON,  
Notary Public in and for the County and State  
above named.

My commission expires April 16, 1949.

Receipt of copy acknowledged.

[Endorsed]: Filed November 2, 1948. [26]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT GEORGE E.  
MITZEL TO PLAINTIFF'S INTERROGA-  
TORIES

Defendant George E. Mitzel states that he does not understand and is without knowledge as to what is meant by a drive-in theatre "of the type exemplified by the drive-in theatre referred to in Paragraph 10 of the Complaint" to which Interrogatories A and B are directed and is therefore unable to answer Interrogatories A and B.

Defendant George E. Mitzel further states on information and belief that the interrogatories are propounded in bad faith and in a manner to unreasonably annoy, harass and oppress the defendant and subject the defendant to unnecessary expense and investigations; that the interrogatories are excessive, burdensome and irrelevant and answers thereto, even if known to [27] defendant, would not be admissible; that plaintiff has admitted that plaintiff does not know who built, sold or used theatres specified in Paragraph 10 of the Complaint and such admission is proof that the Complaint against defendant is sham, frivolous, false and not in good faith.

/s/ GEORGE E. MITZEL.

State of California,  
County of Los Angeles—ss.

Before me, a Notary Public in and for the State and County aforesaid, on this 27th day of October,

1948, personally appeared George E. Mitzel, who, being to me personally known, and having been by me first duly sworn, did depose and say that the facts set forth in the foregoing instrument are true to the best of his knowledge and belief.

[Seal] /s/ MYRTLE JOHNSON,  
Notary Public in and for the County and State  
above named.

My commission expires April 16, 1949.

Receipt of copy acknowledged.

[Endorsed]: Filed November 2, 1948. [28]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT LA VERE CO. TO  
PLAINTIFF'S INTERROGATORIES

Defendant La Vere Co. states that it does not understand and is without knowledge as to what is meant by a drive-in theatre "of the type exemplified by the drive-in theatre referred to in Paragraph 10 of the Complaint" to which Interrogatories A and B are directed and is therefore unable to answer Interrogatories A and B except as follows:

La Vere Co. has built and now owns and operates a drive-in theatre at Jefferson Street and Sepulveda Boulevard in Los Angeles, California, and has applied for and intends to obtain a franchise under patent No. 2,102,718 and Reissue patent No. 22756 as well as applications for Letters Patent

issued to [30] and applied for by Louis P. Josserand, for a flat fee.

Defendant La Vere Co. further states that the interrogatories propounded by plaintiff are excessive, burdensome, ambiguous and irrelevant and answers thereto, even if known to this defendant, would not be admissible. Defendant further states on information and belief that the interrogatories are propounded in bad faith and in a manner to unreasonably annoy, harass and oppress this defendant and subject the defendant to unnecessary expense and investigation.

LA VERE CO.,

By /s/ MERTON E. NOYES,  
Vice President.

State of California,  
County of Los Angeles—ss.

Before me, a Notary Public in and for the State and County aforesaid, on this 30th day of October, 1948, personally appeared Merton E. Noyes, who, being to me personally known and having been by me first duly sworn, did depose and say that the facts set forth in the foregoing instrument are true to the best of his knowledge and belief.

[Seal] /s/ WM. F. HEYLER,  
Notary Public in and for the County and State  
above named.

My commission expires Aug. 5, 1951.

Receipt of copy acknowledged.

[Endorsed]: Filed November 2, 1948. [31]



[Title of District Court and Cause.]

ANSWER OF DEFENDANT DRIVE-IN  
THEATRES OF AMERICA TO PLAIN-  
TIFFF'S INTERROGATORIES

Defendant Drive-In Theatres of America states that it does not understand and is without knowledge as to what is meant by a drive-in theatre "of the type exemplified by the drive-in theatre referred to in Paragraph 10 of the Complaint" to which Interrogatories A and B are directed and is therefore unable to answer such Interrogatories A and B except as follows:

Defendant Drive-In Theatres of America has agreed to issue a franchise under Josserand patent No. 2,102,718 and Reissue patent No. 22756 and pending applications for patent to La Vere Co. covering a theatre located at Jefferson Street and Sepulveda Boulevard in Los Angeles, California, for a flat fee, and a portion of said fee has been received. [33]

Defendant Drive-In Theatres of America contemplates the issuance of a license under Josserand patent No. 2,102,718, Reissue patent No. 22756, and applications for Letters Patent now pending in the name of Louis P. Josserand covering a theatre located on Mt. Vernon Street near Mill Street in San Bernardino, California.

Defendant further states that the interrogatories propounded by plaintiff are excessive, burdensome, ambiguous and irrelevant and answers thereto, even if known to this defendant, would not be admissible.

Defendant further states on information and belief that the interrogatories are propounded in bad faith and in a manner to unreasonably annoy, harass and oppress this defendant and subject the defendant to unnecessary expense and investigation.

DRIVE-IN THEATRES OF  
AMERICA,

By /s/ GEO. E. MITZEL,  
Secretary.

State of California,  
County of Los Angeles—ss.

Before me, a Notary Public in and for the State and County aforesaid, on this 2nd day of November, 1948, personally appeared George E. Mitzel, who, being to me personally known and having been by me first duly sworn, did depose and say that the facts set forth in the foregoing instrument are true to the best of his knowledge and belief.

[Seal] /s/ A. C. HENDERSON,  
Notary Public in and for the County and State  
above named.

My commission expires June 25, 1952.

Receipt of copy acknowledged.

[Endorsed]: Filed November 2, 1948. [34]

[Title of District Court and Cause.]

ANSWER

Come Now the defendants named in the above-entitled action and in answer to the complaint filed herein, admit, allege and deny as follows:

1. Defendants and each of them are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 1 of the complaint and therefore deny said allegations.

2. Each of the defendants admits the allegation of that subdivision of paragraph 2 of the complaint directed to the answering defendant. [36]

3. Defendants and each of them admit the allegations of paragraph 3 of the complaint.

4. In answer to paragraph 4 of the complaint, each of the answering defendants admits that Letters Patent No. 1,909,537 were issued May 16, 1933 to one Richard M. Hollingshead, Jr., but deny that said Letters Patent were duly and legally issued and deny that said Letters Patent were or are for an invention; defendants and each of them allege that said Letters Patent No. 1,909,537 were inadvertently issued without the citation of or the consideration of any prior art.

5. Each of the answering defendants alleges that he or it is without knowledge or information sufficient to form a belief as to the truth of the allegations recited in paragraph 5 of the complaint,



and therefore denies each and every of said allegations.

6. Each of the answering defendants denies each and every of the allegations of paragraph 6 of the complaint.

7. Defendants Seth D. Perkins and George E. Mitzel, jointly and individually, deny each and every of the allegations alleged and contained in paragraph 7 of the complaint.

8. Each of the answering defendants denies each and every of the allegations of paragraph 8 of the complaint.

9. The defendants and each of them deny each and every of the allegations of paragraph 9 of the complaint. [37]

10. In answer to paragraph 10 of the complaint, defendant La Vere Co. states that it has built and now owns and operates a motion picture theater located at Jefferson Street and Sepulveda Boulevard in Los Angeles, California; defendant La Vere Co. denies each and every of the allegations of paragraph 10 of the complaint; defendants Seth D. Perkins, George E. Mitzel and Drive-In Theatres of America and each of them deny each and every of the allegations of paragraph 10 of the complaint.

11. Each of the answering defendants denies each and every of the allegations of paragraph 11 of the complaint. Defendants and each of them specifically deny that non-existent, prospective, or

planned action, device or theater can constitute a cause of action for infringement or constitute a proper allegation in a complaint.

12. The answering defendants, individually and collectively, specifically deny each and every allegation of paragraph 12 of the complaint.

13. Defendants and each of them deny the allegations of paragraph 13 of the complaint.

14. Defendants and each of them are without knowledge or information sufficient to form a belief as to the truth of the matters alleged in paragraph 14 of the complaint, and therefore deny each and every statement and allegation of said paragraph 14.

15. Defendants deny the allegations of paragraph 15 of the complaint. [38]

16. Defendants and each of them specifically deny each and every allegation contained in paragraph 16 of the complaint.

17. As an Affirmative Defense, defendants and each of them allege that long prior to any purported act of invention on the part of Richard M. Hollingshead, Jr., others than said Hollingshead knew and used in this country the steps and means involved in projecting photographic images and pictures upon a surface whereby seated, walking and standing observers could and did observe the projected images and pictures; that long prior to any purported act of invention on the part of Richard M. Hollingstead, Jr., others than said Hollingshead

observed photographic images projected upon a vertical surface while such observers were seated in vehicles such as automobiles; that what is claimed in the claims of patent No. 1,909,537 does not constitute invention in view of what was known, used and published in this country prior to any purported act of invention on the part of Richard M. Hollingstead, Jr.

18. For a further, separate and affirmative defense, defendants allege that said Letters Patent No. 1,909,537 and each and every of the claims thereof is invalid and of no effect in law;

(a) Because the purported inventions and improvements and all material and substantial parts thereof set forth and claimed in said pretended Letters Patent No. 1,909,537 have been patented and described in the following patents prior to the supposed invention thereof by said Richard M. Hollingshead, Jr.: [39]

Lempert, Sept. 2, 1884.....	304,532
Adams, July 12, 1887.....	366,290
Mehling, Oct. 11, 1898.....	612,117
Douglas, July 9, 1901.....	677,961
Nilson, May 17, 1904.....	760,236
McKay, Dec. 27, 1904.....	778,325
Hale, Sept. 19, 1905.....	800,100
Harris, Jan. 23, 1906.....	810,646
Schetzel, March 13, 1906.....	814,875
White, Aug. 14, 1906.....	828,791
Ridgway, Nov. 27, 1906.....	836,708
Hart, Dec. 18, 1906.....	838,989

Jossenberger, July 9, 1907.....	859,604
Garette, Sept. 10, 1907.....	865,882
Freschl, Sept. 1, 1908.....	897,282
Parker, April 6, 1909.....	917,353
Rodden, July 11, 1911.....	997,704
Murie, Oct. 3, 1911.....	1,005,061
Senter, March 2, 1915.....	1,130,026
Truchan, July 13, 1915.....	1,145,946
Hinman, Dec. 14, 1915.....	1,164,520
Keefe, Aug. 28, 1917.....	1,238,151
Adsit, Oct. 22, 1918.....	1,282,164
Thompson, Aug. 16, 1921.....	1,388,130
Togersen, Nov. 15, 1921.....	1,397,064
Faber, Oct. 22, 1929.....	1,732,597
Geyling, et al, March 24, 1931.....	1,798,078
Bennett, Jan. 19, 1932.....	1,842,239
Koloawrat-Krakovsky, May 26, 1914.....	297,488
(German)	

and by other patents and printed publications which are not at present known to the defendants but which the defendants request [40] they be allowed to insert by amendment when ascertained;

(b) because the alleged invention set forth in said Letters Patent No. 1,909,537 was not novel and patentable when alleged to have been produced by the said Richard M. Hollingshead, Jr., and that said theater described and claimed in said Letters Patent and particularly the claims thereof had been known to others in this country prior to the alleged invention thereof by the said Richard M. Hollingshead, Jr., and particularly by the patentees and persons specified in subdivision (a) hereof;

(c) because the specification and claims of patent No. 1,909,537 and particularly claims 2, 4, 5, 6, 10, 15, 16 and 19 thereof describe and claim a theater devoid of any patentable invention in that said specification and claims merely disclose a theater which anyone skilled in the art would be capable of and expected to produce in the exercise of the ordinary skill of his calling;

(d) because the specification and claims of said Letters Patent No. 1,909,537 describe and claim mere aggregations of a number of old parts or elements which, in the claimed aggregations, perform or produce no new or different functions or operations than that heretofore performed or produced by them, and hence do not amount to patentable invention;

(e) because the specification and claims of said Letters Patent No. 1,909,537 and particularly claims 2, 4, 5, 6, 10, 15, 16 and 19 thereof describe and claim more than was actually invented by said Richard M. Hollingshead, Jr., if in fact and in law any invention was made by him.

19. Each of the answering defendants further alleges that the patentee of the patent in suit surreptitiously and unjustly obtained a patent for that which was in fact invented [41] by another or others and failed and unreasonably neglected to file a disclaimer of the subject matter which was not the invention of said Richard M. Hollingshead, Jr.

20. Defendants and each of them also allege that the patent in suit and each and every claim thereof is void and invalid because, for the purpose



of deceiving the public, the description and specification filed by the patentee in the Patent Office was made to contain less than the whole truth relative to his purported invention; and that said purported invention was not shown or described or defined by the claims of the patent in the suit in such full, clear, concise and exact terms as to enable those skilled in the art to practice the alleged invention or to clearly and exactly distinguish what, if anything, was actually the invention of said purported patentee.

21. Defendants and each of them further allege that the plaintiff, through its agents, representatives, employees and officers, has initiated and disengaged in a course of conduct contrary to sound public policy in the harassment of individuals engaged in the construction, operation and use of motion picture theaters, and in such course of conduct, is illegally and unfairly attempting to enforce and enforcing purported rights extending beyond the scope of any Letters Patent owned by said plaintiff; that said illegal extension of the patent monopoly is being employed by the plaintiff for the purpose of damaging each of the defendants in their business and reputation, the plaintiff knowing full well that the patent in suit is invalid and does not have the scope which plaintiff represents it to have; that plaintiff does not come into court with clean hands and is not entitled to relief, since plaintiff has used and is attempting to use the Letters Patent in suit as a means of acquiring interests [42] in theaters, their management, the supply of films thereto, the



operation of concessions therein and other activities which have no bearing upon and do not come within the scope of the patent in suit or any other patent.

Wherefore, these defendants pray that plaintiff take nothing by its complaint herein; that the patent in suit be held invalid and void; and that the said complaint be dismissed as to each of the defendants with judgment and execution for costs and reasonable attorneys' fees unnecessarily incurred by the defendants and each of them.

SETH D. PERKINS,  
GEORGE E. MITZEL,  
LA VERE CO.,  
DRIVE-IN THEATRES OF  
AMERICA.

By JOHNSON & LADENBERGER,  
By /s/ SAM A. LADENBERGER,  
/s/ C. A. MIKETTA,  
Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed December 7, 1948. [43]

[Title of District Court and Cause.]

### REQUEST FOR ADMISSIONS

Pursuant to the provisions of Rules 36 and 37 of the Federal Rules of Civil Procedure, the defendants request the plaintiff to admit, within twelve days after the service of his request, and for all the purposes of this action, the truth of each of the matters of fact set forth herein.

1. That prior to any act of invention by R. M. Hollingshead, Jr., relating to the subject matter of Patent No. 1,909,537, each of the following elements was known to and in use by others in this country:

- a) a stage
- b) a screen
- c) a motion picture projection booth
- d) a motion picture projection booth in operative relation to a screen
- e) an electrical sound reproducing means.

2. That prior to any act of invention by R. M. Hollingshead, Jr., relating to the subject matter of Patent No. 1,909,537, each of the following elements was known to and in use by others in this country:

- a) automobile stallways
- b) automobile driveways
- c) automobile stallways disposed adjacent to each other
- d) abutments in front of an automobile stallway to limit the forward motion of an automobile in said stallway.

3. That prior to any act of invention by R. M.

Hollingshead, Jr., relating to the subject matter of Patent No. 1,909,537, there was known to others and in use in this country each of the following combinations of elements:

a) a screen with a motion picture booth in operative relation thereto

b) a screen, motion picture booth in operative relation thereto, and arrangements for positioning spectators in front of the screen

c) a screen, motion picture booth in operative relation thereto, and electrical sound reproducing means

d) a screen, motion picture booth in operative relation thereto, electrical sound reproducing means, and arrangements for positioning spectators in front of the screen. [46]

4. That prior to any act of invention by R. M. Hollingshead, Jr., relating to the subject matter of Patent No. 1,909,537, persons seated in a vehicle provided with a windshield could view external objects coming within their angle of vision and not obstructed by opaque portions of the vehicle.

5. That prior to any act of invention by R. M. Hollingshead, Jr., relating to the subject matter of Patent No. 1,909,537, there was known to others and in use in this country an arrangement of the spectators' area in a theater such that spectators farther from the stage were positioned higher than those nearer thereto (attention is called to U. S. Patent No. 304,532).

6. That prior to any act of invention by R. M.

Hollingshead, Jr., relating to the subject matter of Patent No. 1,909,537, there was known to others and in use in this country an arrangement of the spectators' area in a theater such that spectators' lines of sight to the stage did not conflict with one another (attention is called to U. S. Patent No. 304,532).

7. That an arrangement whereby persons seated in a vehicle observe or view projected images is shown and described in:

a) U. S. Patent No. 778,325 issued to McKay in 1904.

b) U. S. Patent No. 800,100 issued to Hale in 1905.

c) U. S. Patent No. 1,005,061 issued to Murie in 1911.

d) German Patent No. 297,488 issued to Kolorat-Krakovsky in 1917.

e) U. S. Patent No. 1,238,151 issued to Keefe in 1917.

f) U. S. Patent No. 1,732,597 issued to Faber in 1929. [47]

8. That prior to any act of invention of R. M. Hollingshead, Jr., relating to the subject matter of U. S. Patent No. 1,909,537, there was known to others and in use in this country an outdoor theater including a stage and spaced rows of curvilinear means, for occupancy by spectators, arranged in front of the stage.

9. That prior to any act of invention by R. M. Hollingshead, Jr., relating to the subject matter of

U. S. Patent No. 1,909,537, there was known to others and in use in this country an outdoor theater including a stage and rows of means, for occupancy by spectators, arranged in front of the stage, said rows being separated by passageways through which spectators might pass between said rows.

10. That prior to any act of invention by R. M. Hollingshead, Jr., relating to the subject matter of U. S. Patent 1,909,537, there was known to others and in use in this country an outdoor theater including a stage and curvilinear rows of means, for occupancy by spectators, arranged in front of the stage, said curvilinear rows being separated by curvilinear passageways through which spectators might pass between said curvilinear rows.

11. That prior to any act of invention by R. M. Hollingshead, Jr., relating to the subject of U. S. Patent No. 1,909,537, there was known to others and in use in this country an outdoor theater including a stage and curvilinear rows of means, for occupancy by spectators, arranged in front of the stage, said curvilinear rows being separated by curvilinear passageways through which spectators might pass between said curvilinear rows, spectators occupying said means having a clear view of the stage.

12. That prior to any act of invention by R. M. Hollingshead, Jr., relating to the subject matter of U. S. Patent [48] No. 1,909,537, the use of a motion picture screen on a stage in theaters was well known in this country.



13. That the United States Patent Office did not cite prior patents or publications during the prosecution of that application which resulted in Letters Patent No. 1,909,537.

14. Important factors affecting the visibility of a motion picture screen by a spectator include:

a) Height of the bottom of the screen above a horizontal plane through the base of the spectator-supporting means

b) distance from the spectator-supporting means to the screen

c) size of the screen.

15. Patent No. 1,909,537 does not define any of the factors referred to in paragraph 14, in feet, inches, yards, meters or any other unit of measurement.

16. That Patent No. 1,909,537 does not disclose, in degrees, minutes or other unit of measurement, what difference in angular inclination to the horizontal should exist between successive stallways removed from the stage, as referred to in claim 15 of that patent.

17. That Patent No. 1,909,537 does not disclose whether the difference referred to in paragraph 16 should be uniform from one pair of successive rows to another, or should vary from the front of the theater to the rear thereof.

18. That Patent No. 1,909,537 does not disclose, in feet, inches, yards, meters or other unit of measurement, what difference in height should exist



between successive stallways removed from the stage, as referred to in claim 15 of that patent. [49]

19. That Patent No. 1,909,537 does not disclose whether the difference referred to in paragraph 18 should be uniform from one pair of successive rows to another, or should vary from the front of the theater to the rear thereof.

20. That automobiles vary as to overall height.

21. That automobiles vary as to height of seats above ground level.

22. That automobiles vary as to distance of the front seat back from the windshield.

23. That automobiles vary as to distance of the rear seat back from the windshield.

24. That automobiles vary as to effective vertical transparent height of the windshield.

25. That the factors defined in paragraphs 22-24, inclusive, affect the ability of occupants of automobiles in a theater to see the entire height of the screen through their windshields.

26. That the factors defined in paragraphs 20 and 21 affect the ability of occupants of automobiles in a theater to see the entire height of the screen unobstructed by intervening automobiles.

27. That defendants' Exhibit 1 appended hereto diagrammatically illustrates a theater having the screen of height  $S$  and seating means arranged in eighteen spaced rows in front of the screen, said dia-

gram being drawn to a scale  $\frac{1}{4}$  in. = 1 ft. and that the line marked "eye level" represents the level of eyes of average adult occupants of seating means, in accordance with said scale.

28. That defendants' Exhibit 1 appended hereto diagrammatically illustrates a theater having a screen of height S and seating means arranged in eighteen spaced rows in front of the screen, said seating means being supported upon a flat, horizontal plane at a lower level than the bottom of the screen. [50]

29. That defendants' Exhibit 1 appended hereto diagrammatically illustrates a theater having the screen of height S and seating means arranged in eighteen spaced rows in front of the screen, said seating means including seats, said seats being substantially in a common horizontal plane passing through the bottom of the screen.

30. That in the theater such as is diagrammatically illustrated on appended defendants' Exhibit 1, showing a screen of height S and rows of seats positioned in front of such screen, the included angle of view of the screen for an occupant of a seat in row No. 1 at a distance D1 from the screen (such angle being indicated by A1) is greater than the included angle of view for an occupant of a seat in row No. 3 at a Distance D3 from the screen.

31. That in a theater such as is diagrammatically illustrated in appended defendants' Exhibit 1, hav-

ing seats arranged in spaced rows facing a screen of height S;

(a) the angle of view of the screen for occupants of seats 1, 3, 11, and 18 is indicated by angles A1, A3, A11, and A18, respectively;

(b) said indicated angles of view are progressively smaller as the distance from the screen increases;

(c) the angle of view of the screen for an occupant of a seat further removed from the screen is smaller than the angle of view of the screen for an occupant closer to the screen.

32. That in a theater such as is diagrammatically illustrated in appended defendants' Exhibit 1, having seats arranged in spaced rows facing a screen of height S; [51]

(a) an average adult seated in seat one can see along the bottom of screen S;

(b) an average adult seated in seat 18 cannot see along the bottom of screen S;

(c) an average adult seated in seat 11 cannot see along the bottom portion of screen S.

33. That in a theater such as is diagrammatically illustrated in appended defendants' Exhibit 1, having seats arranged in spaced rows facing a screen of height S;

(a) the angle of view of the screen for an occupant of seat 1 is not obstructed;

(b) an occupant of seat 1 has an unobstructed view of the screen S;

(c) the angle of view of the screen for an occu-

pant of seat 11 (said angle being indicated at A11) is obstructed;

(d) the angle of view of the screen for an occupant of seat 18 (said angle being indicated at angle A18) is obstructed;

(e) an average adult occupant of seat 18 has an obstructed view of the screen S.

34. That in a theater diagrammatically illustrated in defendants' Exhibit 1 appended hereto, changes in inclination of the planes occupied by seats of the seating means from horizontal to +15 degrees or -15 degrees;

(a) would not change the "eye level" of occupants of such seats

- (1) significantly
- (2) appreciably
- (3) materially; [52]

(b) would not change the size of the angles of view of the screen for occupants of seats 1, 3, 11 and 18

- (1) significantly
- (2) appreciably
- (3) materially;

(c) would not allow occupants of seats 11 and 18 to have an unobstructed view of the entire screen S.

35. That defendants' Exhibit 2 appended hereto illustrates a theater provided with a screen having height S and rows of spaced seating means drawn to scale of  $\frac{1}{4}$  in. = 1 ft., the seating means of rows 1 to 9, inclusive, being supported upon a horizontal

plane at a lower level than the bottom of the screen S, seating means 11 to 16, inclusive, being supported upon a horizontal plane slightly above the level of the bottom of the screen and seating means 18 being supported upon a horizontal plane materially above the level of the bottom of the screen S.

36. That in defendants' Exhibit 2, the lines marked "eye level" represent the level of the eyes of the average adult occupants of seating means diagrammatically illustrated in said diagram.

37. That in a theater arranged as diagrammatically illustrated by defendants' Exhibit 2;

(a) an occupant of seating means 1 has an unobstructed view of screen S;

(b) the angle of view of the screen S for an occupant of seating means 11 (said angle being indicated at A11) is obstructed;

(c) the angle of view of the screen S for an occupant of seating means 18 (said angle being indicated at A18) is obstructed; [53]

(d) occupants of seating means 11 to 16, inclusive, and each of them, do not have an unobstructed view of screen S.

38. That in a theater diagrammatically illustrated in defendants' Exhibit 2, changes in inclination of the planes occupied by seats of the seating means from horizontal to +15 degrees or -15 degrees;

(a) would not change the "eye level" of occupants of such seats



(1) significantly

(2) appreciably

(3) materially;

(b) would not change the size of the angles of view of the screen S for occupants of seats 1, 3, 11 and 18

(1) significantly

(2) appreciably

(3) materially;

(c) would not allow occupants of seats 11 to 16, inclusive, and each of them, to have an unobstructed view of the entire screen S.

39. That the angles of view of the screen S for occupants of the seats depicted in defendants' Exhibits 1 and 2 would be increased by increasing the height of such screen S.

40. That the angles of view of the screen S for occupants of the seats depicted in defendants' Exhibits 1 and 2 [54] and each of them would be decreased by decreasing the height of such screen.

Dated this 26th day of January, 1949.

JOHNSON & LADENBERGER,

By /s/ DON A. LADENBERGER,

/s/ C. A. MIKETTA,

Attorneys for Defendants.



DEFENDANTS'S EXHIBITS Nos. 1 AND 2

[Defendant's Exhibits Nos. 1 and 2 attached to the foregoing Request for Admissions are contained in volume II, page 163.]

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[Title of District Court and Cause.]

PLAINTIFF'S RESPONSE UNDER RULE  
36-a (1) TO PART OF DEFENDANTS'  
REQUEST FOR ADMISSIONS

State of New Jersey,  
County of Camden—ss.

Willis Warren Smith being duly sworn deposes and says that he is 60 years of age, a citizen of the United States and resides at 825 Morris Avenue, in Bryn Mawr, Montgomery County, Pennsylvania, and that he is the Managing Director of plaintiff and the one most familiar with and in direct charge of its affairs and that, as such, he makes the following answer [58] or response to defendants' Requests 1 to 5, 8 to 13 and 20 to 24 (all inclusive) for Admissions;—defendants' said Requests being denied except to extent expressly admitted by the following:

1. Request 1 admitted with the qualification that none of the elements referred to in Request 1 were known or used in a drive-in theater prior to the date referred to in Request 1.

2. Request 2 is admitted as to part or sub-section

“b” thereof and is denied as to parts or sub-sections “a”, “c” and “d” thereof because the term “automobile stallways” was not used prior to the filing date of patent 1,909,537. The term “automobile stallways” as used in patent 1,909,537 has reference to sections or segments of an inclined car-aiming ramp. Moreover, the undersigned has never heard of the use of the term “automobile stallways” in connection with anything, prior to the filing date of Hollingshead patent 1,909,537.

3. Request 3 is admitted with the qualifications that prior to the date referred to in Request 3 the various combinations of elements recited in parts or sub-sections “a”, “b”, “c” and “d” of Request 3 were known and used only in and as a part of conventional indoor motion-picture theaters in which the spectators were seated on rows of chairs or benches fastened to or placed on a floor-surface or on floor-surfaces, but not in or as a part of any drive-in theater.

4. Request 4 is admitted.

5. Request 5 is admitted with the qualification that prior to the date referred to in Request 5 the arrangement referred to in Request 5 was known and used only in and as a part of conventional theaters in which the spectators were seated on rows of chairs or benches fastened to or placed on a floor-surface or floor-surfaces, but not in or as a part of any drive-in theater.

6. No statement is made with respect to Request

6, in [59] in view of written objections thereto which are to be served and filed simultaneously herewith.

7. No statement is made with respect to Request 7, in view of written objections hereto which are to be served and filed simultaneously herewith.

8. With respect to Request 8, the undersigned states that prior to the date referred to in Request 8 there were outdoor theaters including a stage and spaced rows of chairs or benches arranged in straight-line parallel relationship in front of the stage for occupancy by individual spectators but states that he has no knowledge of any "curvilinear means" in such theaters prior to said date and therefore denies the Request 8, as worded, on information and belief.

9. Request 9 is admitted with the qualifications that prior to the date referred to in Request 9 the only "rows of means" of which the undersigned is aware were rows of chairs or benches, and that "passageways" were for spectators to pass on foot and were usually inadequate to permit spectators to pass between the rows except when the other occupants of the chairs or benches stood up.

10. Request 10 is denied. The undersigned states that prior to the date referred to in Request 10 there were outdoor theatres including a stage and rows of means, consisting of chairs or benches, disposed in straight-line parallel relationship, for occupancy by spectators, arranged in front of the

stage, said rows being separated by passageways through which spectators might pass on foot (between said rows) but generally only when the other occupants stood up, but states that he is unaware of any "curvilinear rows" or any "curvilinear passageways," in such theatres prior to said date and therefore denies Request 10, as worded, on information and belief.

11. Request 11 is denied for the reasons specified in paragraph 10 above and for the further reason that the [60] spectators did not have a clear view of the stage while other spectators passed directly in front of them.

12. Request 12 is admitted with the qualifications that prior to the date referred to in Request 12 a motion-picture screen was used on a stage only in conventional indoor motion-picture theatres and not in connection with drive-in theatres.

13. Request 13 is denied.

14-19. No statements are made with respect to Requests 14 to 19, inclusive, in view of written objections thereto which are to be served and filed simultaneously herewith.

20. Request 20 is admitted.

21. Request 21 is admitted.

22. Request 22 is admitted.

23. Request 23 is admitted.

24. With respect to Request 24, the undersigned

states that he cannot answer said Request because he does not know what meaning defendants' attorneys intend to ascribe to the expression "effective vertical transparent height," but admits that automobile windshields vary in size and position.

25-40. No statements are made with respect to Requests 25 to 40, inclusive, in view of written objections thereto which are to be served and filed simultaneously herewith.

/s/ WILLIS WARREN SMITH.

Sworn to and subscribed before me this 19th day of February, 1949.

[Seal] /s/ ANNE C. BOYLE,  
Notary Public.

My commission expires Feb. 25, 1951. [61]

Receipt of copy acknowledged.

[Endorsed]: Filed February 23, 1949.

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[Title of District Court and Cause.]

PLAINTIFF'S OBJECTIONS UNDER RULE  
36-A(2) TO PART OF DEFENDANTS' RE-  
QUEST FOR ADMISSIONS

(namely, Requests 6 & 7, 14 to 19 and 25 to 40)

Now comes plaintiff, by its attorneys, and objects to part of defendants' Request for Admissions, namely Requests 6 and 7, 14 to 19 inclusive, and 25 to 40 inclusive;—the remaining Requests (namely



Requests 1 to 5 inclusive, 8 to 13 inclusive, and 20 to 24 inclusive) having been answered in the sworn statement of Willis Warren Smith, as served and filed simultaneously herewith. The grounds for objections are as follows: [63]

(6) Plaintiff objects to Request 6 because

(A) a copy of U. S. patent 304,532, referred to in the request, was not served;

(B) the request is ambiguous, if not, indeed, meaningless, and, as worded, irrelevant, since the "spectators' lines of sight to the stage" cannot possibly "conflict with one another" because "sight lines" are merely imaginary lines leading from the eyes of each spectator to the various parts of the stage or screen to which the spectator may direct his view, and many of such sight-lines from various parts of the theatre to various parts of the stage or screen necessarily cross one another, and such crossing is not relevant,

(C) if the request was intended to be addressed

(1) to an arrangement of the spectators' area in a theatre such as the spectators' line of sight to all parts of the stage or screen are not obstructed or cut off or blocked off, from time to time, by the bodies, heads or hats of other spectators nearer the stage or screen, and

(2) to defendants' seeming contention that U. S. patent 304,532 discloses such an arrangement in theatres,

then the request calls for an expression of opinion



as to the scope of the prior-art (and not “the truth of any relevant matters of fact” as specified in Rule 36-a), and

(D) the request is then also improper because it involved conclusions of law (*Fidelity Trust Company vs. Village of Stickney*, 129 F.2d 506, 511 CCA 7), and

(E) the request then improperly seeks an expression of opinion as to what is disclosed in a public document (namely a United States patent), and [64]

(F) the request is then also vague and indefinite even if it is intended to be addressed to the matters set out in foregoing sub-section “C” of the within paragraph 6 and, for that reason, cannot be answered or responded to either with an admission or a denial, because the obstruction or non-obstruction of any of the many sight lines of any particular spectator is dependent upon his particular location in the (conventional indoor) theatre and whether the spectator is tall or short and whether the persons in front of him (or her) are tall or short, broad-shouldered or narrow-shouldered, and whether the persons in front of him (or her) are seated or standing and whether the persons in front are wearing large hats or small hats or no hats at all, and whether they are leaning their heads to the right or to the left and whether the spectator whose sight-lines are involved happens to be looking to the left side or to the right side of the stage or to a point high up on the screen or to a point low on the screen.

(7) Plaintiff objects to Request 7 because

(A) no copies of the patents, referred to in the request, were served,

(B) the request calls for expressions of opinion as to the scope of the prior-art (and not "the truth of any relevant matters of fact" as specified by Rule 36-a),

(C) the request involves conclusions of law such as are improper, especially since they go to one of the principal issues in the case (namely the alleged lack of invention of the patent-in-suit over the prior-art) *Fidelity Trust Co. vs. Village of Stickney*, 129 F.2d 506, 511 (CCA 7), [65]

(D) the request improperly seeks an expression of opinion as to what is disclosed in various public documents (namely United States and foreign patents).

(14) Plaintiff objects to Request 14 because the request is indefinite and improperly calls for an expression of opinion as to what are "important factors" and does not call for an admission "of the truth of any relevant matters of fact."

(15-19) Plaintiff objects to each of Requests 15 to 19 inclusive because

(A) the requests improperly call for expressions of opinion as to what is disclosed in the patent-in-suit, which is a public document,

(B) the requests improperly call for admissions which would be irrelevant and immaterial because they go to questions of size and dimensions whereas it is well settled that there is no need to include

specific figures as to size or dimensions in a patent, so long as the general structure and principle of operation are disclosed

Motor Improvements Inc. vs. General Motors Corp., 49 F.2d 543, 548 (CCA 6)

Edison Electric Light Co. vs. United States Electric Lighting Co., 52 Fed. 300, 309 (CCA 2),

(C) the request improperly seeks to require plaintiff to interpret the patent-in-suit.

(25-6) Plaintiff objects to Requests 25 and 26 because

(A) the requests are indefinite and improperly call for expressions of opinion as to what are "factors" which "affect the ability of occupants of automobiles in a theatre to see the entire height of the screen," [66]

(B) the request improperly seeks admissions which would be irrelevant and immaterial because they would not relate to the structure of the patent-in-suit and would amount to mere generalizations.

(27-40) Plaintiff objects to Requests 27 to 40 inclusive because

(A) the requests are not directed to "any relevant matters of fact" within the meaning of Rule 36-a and, instead, are addressed to argumentative hypothetical drawings prepared by or for defendant's attorneys and represent an improper attempt by defendants to ease upon plaintiff the burden and expense of proving defendants' own case:

Hopstal vs. Loewenstein,

7 FRD 263, 264 (DC ND Ill.)

Booth Fisheries Corp. vs. General Foods  
Corp.,

27 F. Supp. 268 271 (DC Del.),

(B) the requests improperly seek admissions which would be irrelevant and immaterial because the structure represented in the argumentative hypothetical drawings of Exhibits 1 and 2 do not represent either the structure of the patent-in-suit or the structure of any prior-art patent or publication relied on by defendants, and

(C) the requests improperly seek expressions of opinion as to what is disclosed in defendants' hypothetical argumentative drawings and seek conclusions not involving the "truth of any relevant matters of fact" within the meaning of Rule 36-a.

LYON & LYON,

By /s/ REGINALD E. CAUGHEY,  
Attorneys for Plaintiff.

/s/ LEONARD L. KALISH,  
Counsel for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed February 23, 1949. [67]

[Title of District Court and Cause.]

NOTICE OF HEARING UPON PLAINTIFF'S  
MOTION FOR AN EXTENSION OF TIME  
TO RESPOND TO DEFENDANTS' RE-  
QUEST FOR ADMISSIONS UNDER  
RULES 36 AND 37 AND FOR HEARING  
OF PLAINTIFF'S OBJECTIONS TO CER-  
TAIN OF SAID REQUESTS

To Seth D. Perkins, George E. Mitzel, La Vere Co.,  
a California Corporation, and Drive-In  
Theatres of America, a California Corporation,  
and to Johnson & Ladenberger, Robert Gibson  
Johnson and Don A. Ladenberger, and C. A.  
Miketta, Their Attorneys:

Please take notice that on Monday, March 7, 1949,  
at the hour of 10:00 o'clock a.m. or as soon there-  
after as counsel can be heard, the plaintiff will call  
up for hearing before the Honorable J. F. T. O'Con-  
nor, or some other Judge of this court, in the Court  
Room of said Judge in the Post Office and Court-  
house Building, Los Angeles, California, plaintiff's  
Motion for an Extension of Time to respond to de-  
fendants' request for admissions heretofore filed  
and for a hearing upon plaintiff's objections to cer-  
tain of said requests for admissions.

LYON & LYON,

/s/ REGINALD E. CAUGHEY,  
Attorney for Plaintiff.



/s/ LEONARD L. KALISH,  
Of Counsel.

Receipt of copy acknowledged.

[Endorsed]: Filed February 23, 1949. [69]

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[Title of District Court and Cause.]

MOTION FOR AN EXTENSION OF TIME  
UNDER RULE 6b(2) TO RESPOND TO  
DEFENDANTS' REQUEST FOR ADMIS-  
SIONS

Now comes the plaintiff, by its attorneys, Lyon & Lyon, and moves the court for an order that said plaintiff be allowed to file its response to certain of defendants' requests for admissions served upon defendants' counsel with this Motion and for a further order that said plaintiff be allowed to object to certain of defendants' requests for admissions as set forth in plaintiff's objections thereto served upon defendants' counsel with this Motion.

That upon the hearing of said Motion, the plaintiff will rely upon Rule 6b(2) of the Federal Rules of Civil Procedure, upon the Affidavits of Leonard L. Kalish, Willis Warren Smith and Reginald E. Caughey, filed in support of said Motion and upon the following cases in support of its motion for an extension of time within which to file its answers to said request for [71] admissions:

Kohloff v. Ford Motor Co.,  
1 F.R.S. 37, 27 F. Supp. 803;



O'Leary v. Liggett Drug Co.,  
3 F.R.S. 167; 1 F.R.D. 272;

Schram v. O'Connor,  
5 F.R.S. 43; 2 F.R.D. 192;

Coca-Cola Co. v. Busch,  
7 F.R.S. 34;

Blanton v. Pacific Mutual Life Ins. Co.,  
8 F.R.S. 59; 4 F.R.D. 200,  
appeal from Court's Order dismissed  
146 F.2d 725;

Hopstal v. Loewenstein,  
7 F.R.D. 263, 264.

In support of plaintiff's objections to certain of defendants' requests for admissions, plaintiff will rely upon Rules 36 and 37 of the Federal Rules of Civil Procedure and upon the cases specifically cited in plaintiff's objections to said specific requests.

LYON & LYON,

/s/ REGINALD E. CAUGHEY,  
Attorneys for Plaintiff.

/s/ LEONARD L. KALISH,  
Of Counsel. [72]

[Title of District Court and Cause.]

AFFIDAVIT OF LEONARD L. KALISH

(In support of plaintiff's Motion under Rule 6-b(2) for extension of time to respond under parts 1 and 2 of Rule 36-a to defendants' Request for Admissions under Rules 36 and 37.)

Commonwealth of Pennsylvania,  
County of Philadelphia—ss.

Leonard L. Kalish, being duly sworn, deposes and says:

I am an attorney at law, specializing in patent and trademark matters, with offices in the Land Title Building, in Philadelphia, Pennsylvania, and member, in good standing, [73] of the bars of the Supreme Court of the United States and of the District Courts of the United States for the Eastern District of Pennsylvania and for the District of Columbia, and of the Courts of Appeals of the United States for the Third Circuit and for the District of Columbia, and of the U. S. Court of Customs and Patent Appeals.

I am of counsel for plaintiff in the above-entitled action and have had charge of all patent matters, for plaintiff, since 1933. See *Park-In Theatres, Inc. vs. Rogers*, 130 F.2d 745 (CCA 9) and *Park-In Theatres, Inc. vs. Loew's Drive-In Theatre*, 70 F. Supp. 880.

A copy of defendant's Request for Admissions was received, in my office, on January 31, 1949;—

having been forwarded to me by my co-counsel, Messrs. Lyon & Lyon of Los Angeles, California.

Directly upon the receipt of defendants' Request for Admissions, I telephoned to plaintiff's offices in Camden, New Jersey, with a view to arranging to confer with Mr. Willis Warren Smith, plaintiff's Managing Director, to whom all matters involved in litigation must be referred, but was advised that Mr. Smith was out of the Country, and would probably not return to the United States until the latter part of that week.

I again 'phoned Mr. Smith's offices, in Camden, New Jersey, on Saturday morning, February 5, 1949, but got no answer, and 'phoned again on Monday, February 7th, to learn that Mr. Smith had not yet returned to the United States but was expected back the following morning (February 8th), and was advised by his office that upon his return he would be asked to telephone me.

On February 9, 1949 I was engaged in the United States District Court for the Eastern District of Pennsylvania, and later that day I left for Washington, in connection with hearings which had been scheduled for me in Washington for February 10th. I did not [74] return from Washington until late evening on February 10th.

I telephoned Mr. Smith's office again on Friday morning, February 11th, to learn that he was out of town, and I was unable to reach him either that day or the next.

Mr. Smith contacted me for the first time (after

his return to the United States) on Monday, February 14th.

Messrs. Lyon & Lyon, of Los Angeles, have acted as plaintiff's attorneys and counsel in litigation and in patent matters on the West Coast, for many years (see *Park-In Theatres, Inc., vs. M. A. Rogers*, 130 F. 2d 745; CCA-9) and in such patent matters and litigation I have been associated with Messrs. Lyon & Lyon, as co-counsel. In all such litigation in which I have been associated with Messrs. Lyon & Lyon for a number of years, it has been the practice that Messrs. Lyon & Lyon would forward to me all papers served upon them, so that I might consider them and take them up with our mutual client, in Camden, New Jersey, and that if the time for reply was unusually short, or if they did not hear from me within the time limit allowed for response, Messrs. Lyon & Lyon would either communicate with me to inquire of my needs for further time or would (failing to receive a formal paper from me) ask opposing counsel for an extension of time or ask the Court for an extension of time.

In this action, I relied upon Messrs. Lyon & Lyon to obtain a suitable extension of time to respond (under parts 1 and 2 of Rule 36-a) to defendants' Request for Admissions, particularly as such Request for Admissions was quite voluminous and only twelve days were allowed by defendants' attorneys for response (and a good part of the twelve days would necessarily have to be consumed in transmission through the mails, first Eastward and then Westward). [75]

It is for this reason that I assumed that, under the circumstances, Messrs. Lyon & Lyon would, without any special request on my part, take timely action to obtain an extension of time, if they did not hear from me within the obviously inadequate time-limit fixed by defendants' counsel.

After my conference with Mr. Smith on February 14th I telephoned to the offices of Messrs. Lyon & Lyon, to inquire as to how much of a time-extension had been obtained in this matter, but was advised that Mr. Reginald E. Caughey (of the firm of Lyon & Lyon) who is in direct charge of this action (in Los Angeles) on behalf of plaintiff, was then in Washington, D. C. I thereafter talked to Mr. Caughey, over the telephone, in Washington, and arranged for him to come to Philadelphia to confer with me in this matter, which he did, the evening of Tuesday, February 15, 1949—in the consideration of the propriety of the defendants' Request for Admissions and in the consideration of the preparation of Motion for extension of time. After conferring with me the evening of Tuesday, February 15th and again on the morning of February 16, 1949, Mr. Caughey left for Los Angeles. I again conferred with Mr. Caughey in connection with this matter, over long-distance telephone, on Friday, February 18, 1949.

I was advised by Mr. Caughey that, through inadvertence, namely, through a clerical oversight or error, defendants' Request for Admission was not placed on his calendar, and for that reason, the matter of obtaining an extension of time (beyond



the 12-day limit set by defendants' attorneys) in which to respond (under parts 1 and 2 of Rule 36-a) to defendants' Request for Admissions, escaped his attention as well as the attention of other members of his firm, and was not called to their attention until my first telephone call (above referred to) to Mr. Caughey's office in Los Angeles. [76]

For the foregoing reasons, no extension of time was obtained (although it should have been obtained) in which to respond, under parts 1 and 2 of Rule 36-a, to defendants' Request for Admissions.

It was plaintiff's intention, at all times, to respond to some of defendants' Requests for Admissions (under part 1 of Rule 36-a) and to object to other of such Requests (under part 2 of Rule 36-a), and the delay in filing such responses (by way of sworn statement as to some of the Requests and by way of denials and explanations as to some of the other Requests) was due wholly to inadvertence, accident and mistake, as shown by the accompanying affidavit of William Warren Smith in support of plaintiff's Motion under Rule 6-b(2) for an extension of time in which to respond to defendants' Request for Admissions, and as also shown by my own within affidavit.

I therefore respectfully request that the time within which plaintiff may serve and file its objections to certain of defendants' Requests for Admissions and the sworn statement of its Managing Director as to the other said Requests, be extended,



under Rule 6-b(2), to and including the date upon which the same are filed (simultaneously herewith).

/s/ LEONARD L. KALISH.

Sworn to and subscribed before me this 19th day of February, 1949.

[Seal] /s/ ELIZABETH M. MARR,  
Notary Public.

My commission expires Jan. 15, 1953. [77]

[Title of District Court and Cause.]

AFFIDAVIT OF WILLIS WARREN SMITH

(In support of plaintiff's Motion under Rule 6-b(2) for extension of time to respond under parts 1 and 2 of Rule 36-a to defendants' Request for Admissions under Rules 36 and 37.)

State of New Jersey,  
County of Camden—ss.

Willis Warren Smith, being duly sworn, deposes and says:

I am 60 years of age, a citizen of the United States and reside at 825 Morris Avenue, in Bryn Mawr, Montgomery County, Pennsylvania, and my business offices are at 840 Cooper Street, [78] Camden, New Jersey.

I am the same Willis Warren Smith who made a sworn statement constituting Plaintiff's Response under Rule 36-a(1) to certain of defendants' Requests for Admissions, namely, to Requests 1 to 5,

inclusive, 8 to 13, inclusive and 20 to 24, inclusive.

I am advised that defendants' Request for Admissions under Rules 36 and 37 was served on plaintiff's attorneys, in Los Angeles, on Friday afternoon, January 28, 1949, and that plaintiff's said attorneys, on that day, forwarded defendants' said Request for Admissions to plaintiff's Philadelphia attorney, Leonard L. Kalish, Esq. of Land Title Building, Philadelphia, Pa., who is in charge of all patent matters for plaintiff.

I am further advised that defendants' said Request for Admissions was received in Mr. Kalish's office on January 31, 1949.

It was not possible for any of plaintiff's attorneys to confer with me in connection with this matter (or in connection with any other matter) since the date of service of defendants' aforesaid Request for Admissions until Monday, February 14, 1949, because I was out of the Country from January 21, 1949, to February 8, 1949 (in various parts of Central and South America)—having returned to the United States on February 8, 1949. I did not return to my office until late afternoon of February 8, 1949. I was required to attend to some urgent business matters and was required to be and was out of town on Friday and Saturday, February 11 and 12, 1949 (namely, I was in Clifton Heights, Pennsylvania and in Vineland, New Jersey on Friday, February 11, 1949, and I was in Newburgh and in Elmsford, New York on Saturday, February 12, 1949). For these reasons I was not able to (and did not) contact and was unavailable to my attor-

ney from January 20, 1949 to February 14, 1949. [79]

Directly upon being advised, on *January 14, 1949*, for the first time, of the fact that defendants have filed a Request for Admissions, I conferred with my attorney (Mr. Kalish) concerning the same, and told him that plaintiff most certainly wished to respond to such of defendants' Requests for Admissions as were not objectionable.

The consideration and appraisal of defendants' Requests for Admissions, and the preparation of the response thereto, required a considerable amount of time—partly because defendants' Requests for Admissions are so voluminous and partly because between February 14, 1949, when Mr. Kalish first had an opportunity to confer with me, until the date of this affidavit, I was also out of town a considerable part of the time and hence unavailable to Mr. Kalish either for personal conference or even for consultation over the telephone (having been in New York City the afternoon of February 15 and all day on February 16, 1949, and having been in Trenton and in Newark, New Jersey and in New York City on February 18, 1949, and in New York City almost all day on February 19, 1949).

I therefore, on behalf of plaintiff, respectfully request that the time within which plaintiff may respond under parts (1) and (2) of Rule 36-a, to defendants' Requests for Admissions, be extended under Rule 6-b(2) in order that an unjust result may not be worked in this action.

In support of this request for an extension of

time I further respectfully submit that plaintiff's failure to file the accompanying responses under parts (1) and (2) of Rule 36-a within the time limit specified by defendants' attorneys in their said "Request for Admissions," was due wholly to inadvertence and largely to circumstances beyond the control of either plaintiff or plaintiff's attorney, namely, my absence from the Country at the time, and I further respectfully submit that it was never the [80] intention of plaintiff not to respond to defendants' "Request for Admissions" or to permit such requests to stand as having been admitted merely for the lack of a denial of the matters as to which defendants requested admissions.

That the matters as to which defendants so requested admissions were not proper to be admitted but were proper to be denied, is shown, I respectfully submit, by my sworn statement of even date herewith with respect to requests 1 to 5, 8 to 13, and 20 to 24 inclusive, and also by my attorney's objections to the remaining requests, and is also shown by the fact that at least one of the requests, namely request 13, goes to a matter as to which a public record available to defendants' attorneys would reveal, at a glance, that the matters as to which defendants requested an admission were not matters of fact at all, and that the fact was directly contrary to the admission sought, because the "file-wrapper" of patent 1,909,537, which was and is at all times open to inspection, in the Patent Office, shows that during the prosecution of the application which resulted in patent No. 1,909,537, the U. S.

Patent Office (on January 11, 1933) during the prosecution of the application which resulted in patent No. 1,909,537, did cite (in paper No. 2) the United States patent 1,830,518 issued on November 3, 1931, to William S. Mason of Bridgeport, Connecticut, on "Building With Facilities for Automobile Parking and Transportation" and did also cite page 162 of the February, 1931, issue of "The Architectural Record."

Further deponent sayeth not.

/s/ WILLIS WARREN SMITH.

Sworn to and subscribed before me this 19th day of February, 1949.

[Seal] /s/ ANNE C. BOYLE,

Notary Public. [81]

[Title of District Court and Cause.]

AFFIDAVIT OF REGINALD E. CAUGHEY IN  
SUPPORT OF PLAINTIFF'S MOTION  
UNDER RULE 6-b(2) FOR EXTENSION  
OF TIME TO RESPOND UNDER PARTS  
1 AND 2 OF RULE 36-a TO DEFENDANTS'  
REQUEST FOR ADMISSIONS UNDER  
RULES 36 AND 37

State of California,  
County of Los Angeles—ss.

Reginald E. Caughey, being first duly sworn, deposes and says:

That I am a member of the firm of Lyon & Lyon,



attorneys for the plaintiff in the above-entitled action; that the firm of Lyon & Lyon has represented the plaintiff Park-In Theatres, Inc., for a long number of years in connection with litigation involving patent 1,909,537; that, although said firm has acted as local attorneys for the plaintiff, Mr. Leonard L. Kalish, chief patent counsel for the plaintiff, has directed all of the litigation involving said patent; that in all of the previous litigation involving said patent all motions, pleadings, etc., have been promptly referred to Mr. Kalish for his consideration and no [82] action thereon has been taken by the firm of Lyon & Lyon except under his direction; that the defendants' request for admissions in the above-entitled action was served on me on Friday, January 28, 1949, and in accordance with previous practice I promptly forwarded a copy thereof on the same date to Mr. Kalish; that prior to forwarding said copy I briefly reviewed the same and saw that the nature and length of the request for admissions necessitated consideration by Mr. Kalish and that we did not have sufficient information in Los Angeles to answer or object to any specific request and I further realized that any answers would have to be made by Willis Warren Smith on behalf of the plaintiff inasmuch as Mr. Smith to my knowledge was the only one in the plaintiff organization who had sufficient information concerning the litigation to make the answers; that I further realized from the importance of the above-entitled litigation that answers to the specific requests would be made by the plaintiff or objec-

tions thereto filed on behalf of the plaintiff; that this litigation is one of a series of actions which have been brought involving Hollingshead patent 1,909,537 which is now before the court of appeals for the first circuit from the decision of the district court for the district of Rhode Island wherein the patent in suit was held valid and infringed; that it has been the custom and practice in the past in connection with all motions and papers forwarded to Mr. Kalish for me, as a member of the firm of Lyon & Lyon who has been in charge of the litigation in this office, to secure an order of court or extensions of time if the responses to any motions, etc., have not been received from Mr. Kalish prior to the return date; that in this connection extensions have previously been secured from Mr. Miketta in the above-entitled action; that I was engaged in matters which took up my time during the week commencing February 7, 1949, and said matters were of such importance that they necessitated my going to Washington, D. C., during [83] said week; that solely through inadvertence the time within which answers to defendants' request for admissions or objections thereto should be filed, including the time within which to request an extension of said time, was overlooked by me; that I am the only one connected with Lyon & Lyon who was responsible for obtaining an extension of time if Mr. Kalish did not forward any answers or objections to said request for admissions; that unless I had failed to note said time I would have requested Mr. Miketta for an extension of time within

which to answer or object to the request for admissions or I would have requested the court for an extension of said time explaining the reasons therefor if Mr. Miketta had refused to grant the same; that I would have done this knowing Mr. Kalish would desire the same and realizing that the nature of the request necessitated considerable consideration; that it was not until Tuesday, February 15, 1949, and while I was in Washington, D. C., that I became aware of the fact that I had failed to secure the extension of time within the time specified by Rule 36; that this came up during a telephone conversation with Mr. Kalish who called me from Philadelphia after previously calling the office in Los Angeles; that the inadvertence to note said time was due to the fact that I was very busily engaged in connection with the legal matter which subsequently took me to Washington, D. C., and because I was not active in preparing any answers to the request for admissions or any objections thereto.

/s/ REGINALD E. CAUGHEY.

Subscribed and sworn to before me this 23rd day of February, 1949.

[Seal] /s/ IRENE J. KNUDSEN,  
Notary Public in and for the County and State  
above named.

Receipt of Copy Acknowledged.

[Endorsed]: Filed February 23, 1949. [84]

[Title of District Court and Cause.]

PLAINTIFF'S ANSWER TO DEFENDANTS'  
REQUEST FOR ADMISSIONS NUM-  
BERED "15"

State of Pennsylvania,  
County of Phila.—ss.

Samuel Herbert Taylor, Jr., being duly sworn,  
deposes and says:

I am 47 years of age (will be 48, this month) and reside at 3421 Norwood Avenue, Merchantville, New Jersey, and I am a graduate of the engineering school of Pennsylvania State College, and I am a registered professional engineer, under the laws of the State of New Jersey. [102]

Since 1923, I have been employed in the County Engineer's Office of Camden County, New Jersey, in engineering work, and since 1938, I have been the County Engineer of Camden County, New Jersey, in charge of civil engineering such as planning and construction of highways, bridges, etc.

Since 1933, I have also been the engineer for plaintiff in the above-entitled action, and have prepared for plaintiff and for its licensees working drawings and specifications to be used as a basis for entering into contracts with contractors for the building of drive-in theatres of patent No. 1,909,537 in various locations, and I am thoroughly familiar with the building of drive-in theatres of patent No. 1,909,537, and have (continuously since 1933) prepared many such contract-drawings and contract-

specifications for use in the building of such drive-in theatres of patent No. 1,909,537.

Patent No. 1,909,537 does define:

a) height of the bottom of the screen above a horizontal plane through the base of the spectator-supporting means,

b) distance from the spectator - supporting means to the screen, and

c) size of the screen,

in feet, inches, yards, meters or any other unit of measurement, insofar as said patent shows and describes the relationships of the various elements and factors above referred to, according to the principle of the invention of said patent, and the dimensions above referred to are readily ascertainable (in inches, feet or yards) from said patent, by laying out these relationships on a piece of paper or by laying them out directly on the ground. Thus, while no dimensions are written into patent No. 1,909,537 in the form of feet, inches, yards or meters, such dimensions are defined in said patent by the description and drawings of the [103] principle and mode of operation of the drive-in theatres of said patent No. 1,909,537, which are set forth sufficiently to enable anyone to translate the disclosure of said patent into feet, inches, yards, meters or other suitable measurements as to the

a) height of the bottom of the screen above a horizontal plane through the base of the spectator-supporting means,



- b) distance from the spectator-supporting means to the screen, and
- c) size of the screen.

/s/ SAMUEL HERBERT  
TAYLOR, JR.

Sworn to and subscribed before me this 5th day of April, 1949.

[Seal]: /s/ E. K. MOEDERN,  
Notary Public.

My Commission Expires January 4, 1953.

The foregoing Answer to defendants' Request for Admission #15, as included in the sworn response of Samuel Herbert Taylor, Jr., constitutes and is hereby adopted as plaintiff's Answer to said Request for Admission.

LYON & LYON,  
/s/ REGINALD E. CAUGHEY.

Receipt of Copy Acknowledged.

[Endorsed]: Filed April 13, 1949. [104]

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[Title of District Court and Cause.]

MOTION FOR DISMISSAL

To Park-In Theatres, Inc., and Lyon & Lyon, its attorneys:

Please take notice that on Monday, December 19,

1949, at the hour of 10 o'clock a.m., or as soon thereafter as counsel can be heard, the defendants will call up for hearing before the Honorable James M. Carter, Judge, U. S. District Court, in the courtroom of said Judge, in the Post Office and Courthouse Building, Los Angeles, California, defendants' motion for dismissal of the instant action, said motion being based upon the following grounds:

1. It is urged that the instant action be dismissed against the present defendants on the ground that the patent in suit and each and every of the claims relied upon by the plaintiff are invalid. [106]

2. The pleadings and record in this case give basis for a summary judgment of invalidity of the patent in suit and justify dismissal of the action.

1. This Action Should be Dismissed Because the Patent in Suit is Invalid.

The patent in suit has been held invalid by the United States Court of Appeals for the First Circuit in the case of *Loew's Drive-In Theatres, Inc., v. Park-In Theatres, Inc.*, 174 F(2) 547. That decision held each of the claims here in suit to be invalid, and although the plaintiff, *Park-In Theatres, Inc.*, applied for a writ of certiorari to the Supreme Court of the United States, certiorari was denied in October of 1949 (70 S. Ct. 68). Plaintiff then applied for an extension of time for a rehearing, which was granted (70 S. Ct. 95), and after the petition for rehearing was filed and considered by the Supreme Court, such Court denied

the request for rehearing on December 5, 1949. The patent in suit is therefore invalid.

The instant action is for infringement of the patent. It is elemental that an invalid patent cannot be infringed, and this very fundamental rule was clearly stated by the Court of Appeals for the Ninth Circuit in *Willamette-Hyster Co. v. Pacific Car & Foundry Co.*, (112 F(2) 492).

Since the patent in suit is invalid and it is impossible to find infringement of an invalid patent, there is no basis for the present action and it should be dismissed. [107]

2. The pleadings and records in this case are sufficient to grant summary judgment of invalidity or to substantiate a judgment dismissing the complaint.

The patent in suit relates to a so-called drive-in theater in which automobiles take the place of the ordinary theatre seats. The decision of the Court in 174 F(2) 547 clearly states the grounds upon which the patent was held invalid and for the Court's convenience, excerpts from the decision pertaining to this point are quoted herein.

“\* \* \* This arcuate arrangement of parking stalls in a lot is obviously only an adaptation to automobiles of the conventional arrangement of seats in a theatre employed since ancient times to enable patrons to see the performance while looking comfortably ahead in normal sitting position without twisting the body or turning the head. \* \* \* But nevertheless there is nothing inventive in adapt-

ing the old arcuate arrangement of seats in a theatre to automobiles in a parking lot as the means to achieve horizontal pointing. Indeed the plaintiff does not seriously contend that there is.

“Its contention is that the faculty of invention was called for to devise means for aiming cars vertically, or tilting them, to provide clear fields of vision ahead for persons sitting therein.

“Certainly terracing the parking lot as the means for giving occupants of cars in the rearward rows of stalls a clear field of vision over the tops of cars in front is not inventive. It is again only an adaptation of the familiar sloping floor of the conventional theatre. Nor was the [108] faculty of invention required to grade each row of stalls to an appropriate vertical angle, the rearward rows at successively lesser angles, to aim the cars in each row at the screen. Anyone with even ordinary perception would certainly realize that the vertical angles of the automobiles would have to be adjusted with reference to the height of the screen to achieve clear vision of the screen, and that on a terraced lot the rearward rows of stalls would have to be at successively lesser angles of upward inclination or else the occupants of cars in those rows would not only look over the tops of the cars ahead, but also, unless they craned their necks, look over the screen entirely. And grading the stalls longitudinally as the means for tilting cars in them vertically surely does not call for inventive ingenuity.”

It is to be noted that the Court of Appeals did not specifically refer to prior patents in support



of its holding of invalidity. The record in the instant case refers to prior patents which support this decision and render a holding of invalidity inescapable. Your Honor can take judicial notice of the fact that in the Coliseum of Rome, as well as in Soldiers' Field in Chicago, there were seats arranged in an arcuate manner around a central point or stage. It is conventional in all theatres, from Greek days to the present, to arrange these seats in terraced form, those furthest away from the stage being at a slightly higher elevation than those closer to the stage. All that the instant patentee has done is substitute seats in an automobile for those which normally would have been supported by the ground itself. [109]

The arcuate, as well as terraced, arrangement of seating means in an auditorium or theater is well illustrated in prior art patent No. 304,532, issued in 1884 to Lempert and cited in the answer.

The prior patents, moreover, clearly and definitely show that as early as 1904 people seated in automobiles have looked at motion pictures. Reference is here made to the McKay patent No. 778,325 issued in 1904 (cited in defendants' answer), which, in Fig. 2, illustrates an automobile (15) mounted upon an upwardly inclined runway or trackway, the occupants of such automobile being able to look at motion pictures projected upon a screen 39 and a proscenium arch 41. The appended affidavit of counsel specifically calls attention to portions of this patent which state that the vehicle is inclined upwardly (as required by some of the claims in suit)



and that the motion pictures are projected and viewed by the passengers while they are occupying seats in the vehicle. This patent, therefore, adds further support for the conclusions reached by the Court of Appeals of the First Circuit in holding the patent invalid.

The file of the instant case also makes reference to the Hale patent No. 800,100, issued in 1905, which describes an arrangement whereby persons seated in a vehicle may observe motion pictures projected upon a screen 12, as best illustrated in Fig. 3 of the said patent. In the event it is necessary to show that vehicles occupied adjoining stallways while the occupants of various vehicles observed the same motion picture screen, Your Honor may wish to look at the Keefe patent No. 1,238,151 issued in 1917, which illustrates a number of vehicles 17 in adjacent relation in adjacent stallways, the occupants of these vehicles viewing motion pictures projected upon a screen 14 in very much the same manner as is done in modern drive-in theaters. [110]

3. The record in this case is sufficient to support a judgment of dismissal.

It is submitted that plaintiff, in the instant case, has admitted facts which now prevent plaintiff from contending that the patent is valid. The admitted facts render the decision of the Court of Appeals for the First Circuit controlling.

Defendants in the instant case file requests for admissions and, in response thereto, the plaintiff has admitted that each of the following elements

was old: a stage, a screen, a motion picture projection booth in operative relation to a screen, electrical sound reproducing means, auto stallways, auto driveways, etc. More specifically, plaintiff has admitted (as indicated by the record in the instant case):

“That prior to any act of invention by R. M. Hollingshead, Jr., relating to the subject matter of U. S. patent No. 1,909,537, there was known to others and in use in this country an outdoor theater, including a stage and rows of means, for occupancy by spectators, arranged in front of the stage, said rows being separated by passageways through which spectators might pass between said rows.”

Plaintiff has also admitted that prior to any acts of invention by the patentee of the patent in suit

“\* \* \* there was known to others and in use in this country an arrangement of the spectators' area in a theater such that spectators further from the stage were positioned higher than those nearer thereto.”

Since these arrangements were old, there is no invention involved in substituting automobiles for ordinary theater seats. Certainly there is no invention in placing the automobiles upon [111] inclines in view of what is shown in patent No. 778,325 issued in 1904. Certainly there is no invention in any of the elements of the claims of the patent in suit since, as previously indicated, the alleged patentee did not invent an automobile stallway, he did

not invent a stage, a screen, a motion picture projection booth, or sound reproducing means.

It is therefore urged that, in view of the record before Your Honor and in view of the prior decision by the Court of Appeals for the First Circuit, this action should be dismissed.

4. The complaint should be dismissed, or in the alternative, an early trial date set.

The plaintiff, Park-In Theatres, Inc., knowing full well that the patent in suit was invalid, has harassed defendants herein and the entire trade all over the country and has imposed a high royalty burden on over six hundred theaters in this country. The instant action was brought against these defendants not because plaintiff actually believed that the patent in suit was valid but only for the purpose of injuring defendants in their respective businesses. The record definitely shows that plaintiff has avoided and evaded the issues; it has refused to answer requests for admissions; answers to certain requests for admissions have been made in an argumentative and false manner in order to cause the defendants to go to added expense in presenting proof of facts which should have been admitted originally. The present defendants have been caused to incur needless and unnecessary expense in their defense.

It is therefore urged that the present action be either dismissed or an early trial date set, and defendants be given the right to file an amended answer and counterclaim for the purpose of having

this court adjudicate the invalidity of the [112] patent in suit and impose costs and attorney's fees upon the plaintiff.

Dated this 8th day of December, 1949.

JOHNSON & LADENBERGER,

By /s/ DON A. LADENBERGER,

/s/ C. A. MIKETTA,

Attorneys for Defendants.

[Title of District Court and Cause.]

### AFFIDAVIT

State of California,  
County of Los Angeles—ss.

C. A. Miketta, being duly sworn, deposes and states that he is an attorney-at-law with offices at 210 West Seventh Street, Los Angeles, California; that he is of counsel in the above-entitled case and that each of the patents mentioned hereinafter are specifically referred to in the answer on file in such case.

Affiant has carefully studied the patent in suit No. 1,909,537 and the claims thereof and has made a careful study of prior patents and publications relating to the subject matter of [114] the patent in suit; that the study convincingly shows that patent No. 1,909,537 is invalid for lack of invention and by reason of the fact that it fails to comply with R. S. 4888 (35 U.S.C.A. §33).

Affiant states that each of the claims of said



patent was held invalid on grounds clearly stated by the United States Court of Appeals for the First Circuit in the case of Loew's Drive-In Theatres, Inc. v. Park-In Theatres, Inc., reported at 174 F(2) 547. That the United States Court of Appeals for the First Circuit correctly stated that the arrangement defined by the patent in suit "is obviously only an adaptation to automobiles of the conventional arrangement of seats in a theater employed since ancient times" and in support thereof affiant states that substantitally the same arrangement of seats is illustrated in the Lempert patent No. 304,532 issued in 1884 and cited in defendants' answer in the instant case. A copy of the Lempert patent is appended hereto as Exhibit B.

The Court of Appeals was correct in holding that there was no invention involved in tilting cars vertically, and as evidence thereof affiant calls attention to patent No. 778,325 issued in 1904 to McKay, which clearly illustrates an arrangement whereby persons seated in a vehicle upon an incline were permitted to view a motion picture projected upon a screen toward which such vehicle was aimed. The McKay patent is attached hereto as Exhibit C and specific attention is drawn to page 1, lines 76, 77 and page 2, lines 21-28.

Affiant further calls attention to the fact that vehicles in adjacent relationship, aimed toward a common motion picture screen, are illustrated in the Keefe patent No. 1,238,151, issued in 1917, said patent clearly describing an arrangement whereby persons seated in the said vehicles could simultaneously



observe motion pictures projected upon the screen 14, as best [115] illustrated in Fig. 3 of patent No. 1,238,151 (a copy of said patent being attached hereto as Exhibit D).

Dated this 8th day of December, 1949.

/s/ C. A. MIKETTA.

Subscribed and sworn to before me this 8th day of December, 1949.

[Seal]: /s/ MILDRED K. BADGER,  
Notary Public in and for the County and State  
above-named.

My Commission Expires Mar. 2, 1952.

Receipt of Copy Acknowledged.

[Endorsed]: Filed December 9, 1949. [116]

At a stated term, to wit: The September Term. A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday the 19th day of December, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable: James M. Carter,  
District Judge.

[Title of Cause.]

ORDER DEFENDANTS' MOTION  
FOR DISMISSAL

For (A) hearing motion of defendants, filed Dec. 9, 1949, to dismiss the action on the grounds (1) invalidity of patent, and (2) record in the case is basis for a summary judgment of invalidity; (B) for setting; R. E. Caughey, Esq., appearing as counsel for plaintiff; C. A. Miketta, Esq., appearing as counsel for defendants;

Attorney Miketta argues in suport of motion, and Attorney Caughey argues in opposition.

It is stipulated and ordered that defendants' motion be deemed a motion for summary judgment, that it be deemed that plaintiff to have joined with defendant moved for summary judgment, on the question of invalidity.

It is stipulated and orderd that defendants have to, and including Dec. 21, 1949, to file a supplemental or amended motion; that the motions stand

submitted on the record, together with briefs, and affidavits to be filed; plaintiff to have to, and including Jan. 6, 1950, to file opposing documents and defendants to have to, and including Jan. 16, 1950, to file reply documents. [117]

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[Title of District Court and Cause.]

### MOTION FOR SUMMARY JUDGMENT

Pursuant to the order of the Court made during the hearing held December 19, 1949, permitting defendants to file an amplified Motion For Summary Judgment, the defendants in the above-entitled case now present their Motion For Summary Judgment and pray the Court to hold the patent in suit invalid. It is understood that plaintiff joins with defendants in the presentation of this Motion For Summary Judgment.

It is submitted that the patent in suit is invalid and judgment of invalidity should be granted for the following reasons:

1. The patent in suit is invalid for the reasons stated by the United States Court of Appeals for the First Circuit [118] (*Loew's Drive-In Theatres, Inc. v. Park-In Theatres, Inc.*, 174 F(2) 547). It is to be noted that in such First Circuit case the plaintiff applied for a writ of certiorari to the Supreme Court of the United States and certiorari was denied (70 S. Ct. 68). Plaintiff then applied for an extension of time for a re-hearing which was

granted (70 S. Ct. 95) and after the petition for re-hearing was filed and considered by the Supreme Court such Court denied the request for re-hearing on December 5, 1949.

Although the decision of the Court of Appeals for the First Circuit is not binding upon Your Honor, it is extremely persuasive and under the commonly accepted rules of comity this Court should not reach a different conclusion unless the reasons expressed by the First Circuit in their decision are clearly overcome by the plaintiffs in this action and unless the plaintiffs in this action can show Your Honor that the First Circuit was in error as a matter of law. It is submitted that plaintiffs cannot show that the First Circuit erred inasmuch as the United States Supreme Court denied a writ of certiorari; such denial is in effect a holding that there was no error in the reasoning or decision of the First Circuit.

2. It is submitted that the patent in suit is invalid as a matter of law for lack of invention over the prior art. The claims of the patent in suit, and particularly claims 2, 4, 5, 6, 10, 15, 16, and 19 thereof, are devoid of any patentable invention in that they merely disclose a theatre which anyone skilled in the art would be capable of and expected to produce in the exercise of the ordinary skill of his calling, particularly in view of the numerous outdoor theatres, amphitheatres, and stadia of the prior art (illustrated and referred to in the Encyclopedia Britannica, Fourteenth Edition, Volume

I, Pages 847 and 848, and Volume XXI, plates 1 and 2, opposite Pages 272 and 273, said pages being attached hereto as defendants' Exhibits A1, A2, A3, and A4) and the showings of each of the following Letters Patent:

Lempert, September 2, 1884.....	304,532
Adams, July 12, 1887.....	366,290
Mehling, October 11, 1898.....	612,117
Nilson, May 17, 1904.....	760,236
McKay, December 27, 1904.....	778,325
Hale, September 19, 1905.....	800,100
Harris, January 23, 1906.....	810,646
White, August 14, 1906.....	828,791
Ridgway, November 27, 1906.....	836,708
Fheschl, September 1, 1908.....	897,282
Truchan, July 13, 1915.....	1,145,946
Hinman, December 14, 1915.....	1,164,520
Keefe, August 28, 1917.....	1,238,151
Togersen, November 15, 1921.....	1,397,064
Geyling, et al., March 24, 1931.....	1,798,078

each of which being mentioned in Section 18 of defendants' Answer. [120]

3. The patent in suit is invalid for the reason that it fails to define and claim the invention in such full, clear, concise and exact terms as are required by the provisions of R. S. 4888 (35 U.S.C.A. Section 33). Your Honor will readily appreciate that among the important factors which affect the visibility of a motion picture screen by a spectator one must consider:

- a. the height of the bottom of the screen



above a horizontal plane through the seat upon which the spectator rests,

b. the distance from the spectator's seat to the screen,

c. the size of the screen,

d. the overall height of the automobile; the height of the seat above the ground; and the distance between the seat and the windshield,

e. the effective vertical transparent height of the windshield of the automobile; the angle of inclination of the back of the seat; etc.

It is notable that the patent in suit does not specify these controlling factors and does not define them in feet, inches, yards, meters, degrees, or any other unit of measurement. As a result the patent does not actually disclose or teach the invention, in its claims so as to "enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same." (U.S.C.A. Section 33). [121]

4. A still further reason why the patent in suit is invalid is that, at the point where the "invention" purportedly exists, the patentee uses functional language. For example, in claim 2 the supposed invention is expressed in the following words:

"said automobile stall-ways being at a vertical angle with respect to the stage such as will produce a clear angle of vision from the seat of the automobile \* \* \*"

The Claim Is Invalid On Its Face

“\* \* \* \* The claim is invalid on its face. It fails to make a disclosure sufficiently definite to satisfy the requirements of R. S. §4888, 35 U.S.C. §33. \* \* \*” (Page 368).

“\* \* \* \* Patents, whether basic or for improvements, must comply accurately and precisely with the statutory requirements as to claims of invention or discovery. The limits of a patent must be known for the protection of the patentee, the encouragement of the inventive genius of others and the assurance that the subject of the patent will be dedicated ultimately to the public. The statute seeks to guard against unreasonable advantages to the patentee, and disadvantages to others arising from uncertainty as to their rights. \* \* \*” (Page 369).

“\* \* \* \*

The claim further states that the grains must be ‘of such size and contour as to prevent substantial sagging and offsetting’ during a commercially useful life for the lamp. The clause is inadequate as a description of the structural characteristics of the grains. \* \* \*” [122]

“\* \* \* \* Claim 25 vividly illustrates the vice of a description in terms of function. \* \* \* \*”

General Electric Co. v. Wabash Co., 304 U. S. 364 at pages indicated.

In considering this motion, Your Honor is requested to note that plaintiff does not contend that there is invention in any single element described in the patent in suit; plaintiff admitted that the ele-

ments, individually, are old; plaintiff simply contends that the combination in the claims is new and inventive. This was developed at the hearing held before the Court on December 19, 1949.

In support of the Motion For Summary Judgment of invalidity plaintiff will rely upon the appended Exhibits A1, A2, A3, and A4, copies of each of the prior art patents referred to in Sub-Division 2 hereof and listed in the Answer on file in this case, the decision of the Court of Appeals for the First Circuit, the Admissions of plaintiff in response to defendants' requests, the pleadings and papers on file in this case and the appended affidavit of counsel. Points and authorities will be submitted with defendants' reply due January 16, 1950. Pursuant to the order of this Court plaintiff is to file its memorandum on January 6, 1950.

Dated this 21st day of December, 1949.

/s/ C. A. MIKETTA,  
Attorney for Defendants.

Service and receipt of the above Motion For Summary Judgment is hereby acknowledged this 21st day of December, 1949.

LYON & LYON,  
By /s/ R. E. CAUGHEY,  
Attorneys for Plaintiff. [123]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT OF INVALIDITY

State of California,  
County of Los Angeles—ss.

C. A. Miketta, being duly sworn, deposes and states that he is an attorney-at-law with offices at 210 West Seventh Street, Los Angeles, California; that he is one of the attorneys of record in the above-entitled case; that affiant has carefully studied the patent in suit No. 1,909,537 and the claims thereof and has made a careful study of prior patents and publications relating to the subject matter of the said patent; that among said publications affiant shall refer to Exhibits A1, A2, A3 and A4 (being excerpts from the Encyclopedia Britannica, 14th Edition) and prior patents, [124] Exhibits B1-B15, inclusive, said patents being listed in defendants' answer in this case and appearing on page 5 of said answer.

Affiant states that the patent in suit relates to a so-called drive-in theater, including among other elements, the following:

a stage (claims 2, 4, 10 and 15,) or screen (claims 5 and 6,) or "exhibiting means" (claims 16 and 19);

stallways for automobiles, arranged in front of the stage or screen so as to face the screen or stage;

a motion picture projector and electrical reproducing means;

an abutment along the front boundary of each of the stallways for limiting forward movement of the automobiles therein (claims 4 and 6);

some means for longitudinally tilting the automobiles in the stallways, stated in some of the claims as follows: "said automobile stallways being at a vertical angle with respect to the stage such as will produce a clear angle of vision from the seat of the automobile, through the windshield thereof to the stage, free from obstruction from the automobiles ahead of it." (claims 2, 4, 5, 6, etc.) [125]

In other claims the tilt is simply stated to be for the purpose of producing or "to produce a generally clear angle of vision \* \* \*," as in Claim 10. In certain of the claims, such as 15, 16 and 19, it is stated that the stalls further removed from the stage are successively higher (claims 15, 16, 19.)

Affiant states that the plaintiff in this action has in its interrogatories and by admissions in Court, admitted that the patentee of the patent in suit did not invent automobiles, stallways, a stage or screen, a motion picture projector, nor electrical reproducing means. Affiant states that outdoor theaters per se are old, as is evidenced by ancient amphitheaters and in support thereof refers to pages 847 of 848 of Volume 1 of the Encyclopedia Britannica, 14th Edition, said pages constituting Exhibits A1 and A2 hereof.



Affiant states that there is no invention involved in arranging seats in curvilinear rows facing a stage, screen or other exhibition means and such curvilinear arrangements are exemplified in many amphitheaters and stadia, both in the United States and in foreign countries, built long before the filing date of the patent in suit. In support thereof affiant refers to Exhibits A1, A2, A3 and A4, constituting plates 1 and 2 from Volume 21 of the Encyclopedia Britannica, 14th Edition. Affiant calls attention to the fact that on plate 2 (Ex. A4) the photograph identified by the number 5 is that of an ancient amphitheater at Nimes, France, and points out that the upper left-hand portion of said photograph clearly shows adjacent stallways into which vehicles could have been driven and could now be driven for the purpose of permitting the occupants to observe the "exhibiting [126] means" located in the center of the arena or stadium.

Deponent states that whether seats for observers are supported on a floor (above ground), as in theaters, or on terraced ground, is immaterial. Curvilinear arrangements, as well as terracing, are illustrated in patent No. 304,532 (Ex. B1). Page 847 of the Encyclopedia Britannica (Ex. A1) refers to an amphitheater "in which the seats were placed largely on banked-up earth." The tilting of floors (in whole or in part) in a theater is not new and patent No. 366,290 (Ex. B2) describes an arrangement whereby

"\* \* \* The floor of an entire hall may be

given any desired inclination; or, if preferred, the floor may be divided into several sections, each of which may be provided with my invention, and all or any one or more of the sections may be inclined, as desired." (Page 1, lines 62-68)

The placement of seats upon an incline is clearly shown in patent No. 800,100 (Ex. B6,) page 2, lines 31-33. Deponent states that the prior patents clearly show that the arrangement of observers either upon terraced ground or upon seats arranged in terraces and directed toward the scene or stage is not new and in support thereof refers to patent No. 612,117 (Ex. B3) which describes a vehicle having terraced seats

"\* \* \* which rise from the front toward the rear, this giving an opportunity for passengers on the rear seats to have an unobstructed view over the heads of those in front." (Page 1, lines 31-35).

Affiant calls attention to the fact that there is no invention in pointing a vehicle toward the view and in support thereof refers to patent No. 810,646 (Ex. B7) and No. 836,708 (Ex. B9). [127] In both of said patents arrangements are provided for positioning a vehicle in such manner that the occupants of the vehicle observe the screen or view. Affiant calls attention that in the arrangement illustrated in Ex. B6 the vehicle itself is pointed toward a motion picture screen, so that persons seated in

the vehicle observe motion pictures, the patent stating:

“The floor of the car is preferably arranged on an incline to give the passengers a good view.” (Page 2, lines 31-33).

Affiant states that the prior patents clearly show and describe vehicles pointed toward a screen upon which motion pictures are projected so as to permit occupants of the vehicles to clearly see the screen; that such combination of elements is shown in the McKay patent No. 778,325 (Ex. B5) issued in 1904, wherein a vehicle 15 is shown positioned upon an incline, the vehicle being directed toward a proscenium 41 and a screen 39, motion pictures being projected upon the screen and proscenium by means of a motion picture projector 37. Such arrangement is best illustrated in Fig. 2 of the patent Ex. B5.

Deponent further calls attention to the fact that a similar arrangement of a vehicle whose occupants may look at motion pictures is illustrated in patent No. 1,145,946 (Ex. B11,) wherein motion pictures are projected upon the screen 23 while the occupants of the vehicle are seated in the seats 22.

Deponent calls attention to the fact that placement of vehicles in side-by-side relation, all of the vehicles being directed toward a common screen, is clearly illustrated in patent No. 1,238,151 issued in 1917 (Ex. B13). In Ex. B13 the occupants of vehicles 17, arranged in side-by-side relation view a common screen 14 upon which motion pictures are projected by the projector 15. [128]

The projection of motion pictures in the open air does not differ from the projection of motion pictures within an enclosure and the patentee of the patent in suit was not the first to project motion pictures in the open air, as evidence by patent No. 1,798,078 (applied for in 1928 and issued in 1931,) defendants' Ex. B15. There the projection apparatus is mounted in a tower 6 and the pictures are projected upon a large screen 1 so as to be visible to the occupants of vehicles, one of said vehicles being illustrated in Fig. 1 of Ex. B15.

Deponent states that there is no invention in tilting a seat so as to permit the occupant to more comfortably observe what is front of him and means for tilting seats have been available since at least 1907, as indicated by patent No. 897,282 (Ex. B10) and patent No. 1,164,520 (Ex. B12). Deponent states that it is common knowledge and within the experience of all motorists who have travelled in mountainous areas to reach a lookout point and find that such lookout is ordinarily provided with an edge barrier provided with an inwardly directed sloping surface; that it was common practice long prior to the patent in suit to drive a vehicle onto such lookout point, point it in the direction of the desired view and drive the front wheels of the vehicle onto the sloping barrier so as to permit the occupants a clear angle of view from the seat of the automobile through the windshield thereof. Affiant states that in view of the disclosures of the prior patents, the availability of sloping floors (as indicated by Ex. B2,) the ancient use of terraced earthen banks (as indicated

by the excerpt from the Britanica, Ex. A1,) and the other teachings of other prior art which indicate the desirability of actually pointing the vehicle at the scene to be observed, there is no invention defined in the claims of the patent in suit, and as stated by the Court in the First Circuit decision (174 F.(2) 547): [129]

“Anyone with even ordinary perception would certainly realize that the vertical angles of the automobiles would have to be adjusted with reference to the height of the screen to achieve clear vision of the screen, \* \* \*”

and that

“\* \* \* grading the ground upon which an automobile is to be placed for the purpose of giving it the tilt desired would be the first expedient to occur to anyone \* \* \*.”

Affiant is therefore convinced that the patent in suit No. 1,909,534 does not disclose an invention and that such patent is invalid, since it is contrary to the established rules pertaining to invention.

“It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures.”

Atlantic Works v. Brady 107 U.S. 192, 199-200; cited with approval in Wilson-Western



Sporting Goods Company v. Barnhart (CA 9) 81 F(2) 108.

The rule is also clearly stated in Phillips et al. v. Detroit, 111 U.S. 604; Mantle Lamp Co. v. Aluminum Products Co., 301 U.S. 544; Ray v. Bunting Iron Works, (CA 9) 4 F(2) 214.

Affiant states that he has personally prepared numerous drawings to scale and has demonstrated to his own satisfaction that factors which affect the visibility of a motion picture screen by spectators include:

(a) the height of the bottom of the screen above a horizontal plane through the [130] seat upon which the spectator rests (or the height of the bottom of the screen above a horizontal plane passing through the eye level of the spectator);

(b) the distance from the spectator's seat to the screen;

(c) the size of the screen;

(d) the overall height of the automobile; the height of the seat above the ground; and the distance between the seat and the windshield;

(e) the effective vertical transparent height of the windshield of the automobile; the angle of inclination of the back of the seat;

(f) other factors.

Deponent states that he has checked the sizes and dimensions of various makes of automobiles and it is common knowledge, of which the Court could take

judicial notice, that certain automobiles, such as the modern Studebaker, give the occupant a different angle of view through the windshield than that given the occupant of a Model T Ford or a Pierce-Arrow. Deponent has personally checked the disclosures of patent No. 1,909,537 and states that the patent does not specify controlling factors such as the size of the screen, height of the bottom of the screen above eye level, distance of the automobile from the screen, angle of inclination of the ground upon which the automobile is to be supported, or the angle of inclination of the back of the seat occupied by the spectator, and other factors necessary for the successful layout and design of a drive-in theater; that these controlling factors are not defined in feet, inches, yards, meters, degrees, or any other unit of measurement. That as a result, the claims of the patent in suit do not teach how a successful drive-in theater can be constructed and therefore such claims are invalid since they do not conform to the statutory requirements referred to in 35 USCA §33.

Dated this 21st day of December, 1949.

/s/ C. A. MIKETTA.

Subscribed and sworn to before me this 21st day of December, 1949.

[Seal] /s/ MILDRED K. BODGER,  
Notary Public in and for the County and State  
Above-Named.

My Commission Expires Mar. 2, 1952.

[Endorsed]: Filed December 22, 1949. [132]

EXHIBITS B1 TO B<sup>15</sup>~~13~~, INCLUSIVE

[Exhibits B1 to B<sup>15</sup>~~13~~ inclusive attached to the foregoing affidavit are contained in volume II, pages 164 to ~~100~~.]

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[Title of District Court and Cause.]

## AFFIDAVIT OF C. A. MIKETTA

State of California,  
County of Los Angeles—ss.

C. A. Miketta, being duly sworn, deposes and states that he is one of the attorneys of record representing the defendants in the above-entitled case; that affiant has heretofore billed the said defendants, for services and disbursements pertaining to the above action, the sum of \$2,685.70 and, in addition, has rendered services amounting to \$375 which are as yet unbilled.

/s/ C. A. MIKETTA.

Subscribed and sworn to before me this 30th day of January, 1950.

[Seal] /s/ MILDRED K. BODGER,

Notary Public in and for the County and State  
Above-Named.

My Commission Expires Mar. 2, 1952

[Endorsed]: Filed January 31, 1950. [227]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR  
COSTS AND ATTORNEYS FEES

State of California,  
County of Los Angeles—ss.

Don A. Ladenberger, being first duly sworn, deposes and states that he is an attorney-at-law with offices at 453 South Spring Street, Los Angeles, California.

That he is one of the attorneys of record in the above-entitled case.

That he has personal knowledge of the services performed by Johnson & Ladenberger, attorneys-at-law, for defendants in the above-entitled case; that the office of Johnson & Ladenberger has already been paid by defendants the sum of \$281.25 in legal fees for services rendered; that since the services rendered which have been paid for, affiant has rendered additional services to the [228] defendants including court appearances, conferences with other attorneys of record for the defendants, and in the preparation and review of various pleadings and other documents filed in the above-entitled case; that to the date of this affidavit the reasonable value of said services is the sum of \$150.00, and that defendants have been rendered a statement for services in that amount.

Dated this 30th day of January, 1950.

/s/ DON A. LADENBERGER,  
Attorneys for Defendants.

Subscribed and sworn to before me this 30th day of January, 1950.

[Seal]: /s/ ROBERT GIBSON  
JOHNSON,

Notary Public in and for Said County and State of California.

My Commission Expires May 18, 1952.

[Endorsed]: Filed January 31, 1950. [229]

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[Title of District Court and Cause.]

AFFIDAVIT OF SAMUEL HERBERT TAYLOR, JR., IN OPPOSITION TO DEFENDANTS' MOTION FOR DISMISSAL AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

State of Pennsylvania,  
County of Philadelphia—ss.

Samuel Herbert Taylor, Jr., being duly sworn, deposes and says:

I have heretofore made an affidavit dated April 5, 1949, and filed in this action on April 13, 1949, as part of Plaintiff's Answer to Defendants' Request for Admissions numbered "15," and the statements made in my former affidavit are included here, by reference.

I have examined the prior patents, as well as pages 847 and 848 of Volume I and Plates I and II opposite pages 272 [230] and 273 of Volume XXI



of the 14th edition of the Encyclopedia Britannica relied upon by defendants on their Motion to Dismiss and on their Motion for Summary Judgment.

None of the prior patents nor the above-cited publication discloses any drive-in theatre construction or arrangement in which roofed passenger automobiles of varying vintages and sizes and heights are or could be placed one behind the other in a number of successive rows each further from the screen, and in which the occupants of such automobiles could have a full view of the same motion picture screen and effectively view a motion picture projected thereon, from both the front and rear seats of the automobiles, without their view being obstructed either by the cars in viewing-position ahead or by cars moving transversely of the sight-line into and out of such viewing positions ahead.

No construction capable of being so used or suitable for any such use is disclosed in any of the prior-art patents or publications relied upon by defendants and cited by defendants either in their Answer or in their "Request for Admissions" or in their Motion for Dismissal or in the affidavit of C. A. Miketta dated December 8, 1949, or in their Motion for Summary Judgment or in the affidavit of C. A. Miketta dated December 21, 1949.

The Encyclopedia Britannica (which I am advised was published in 1945) and which purports to show a Roman Amphitheatre, known as a Coliseum, discloses nothing more than a generally circular or perhaps elliptical amphitheater not unlike the common football stadiums familiar to all, except that it

appears to be surrounded by a high stone wall with high-arched openings therethrough and with the exits to these archways being flanked by some more radially disposed stone walls, presumably to separate the crowd as it leaves the amphitheater into radially moving masses of people, each pair of radially disposed stone walls forming a radially exit-way leading to one [231] of the arches in the wall.

Thus, page 847 describes these ancient amphitheaters as having the central or arena portion thereof (i.e. where the performance or spectacle took place or was staged) as being raised and having beneath it cells for wild beasts, storage rooms, connecting passageways and rooms for gladiators, connected by many trap doors (with the arena above):

“Around this arena, and separated from it by a high wall, arose the seats of the spectators. These were divided by passageways running around the amphitheatre into several sections (*maeniana*); the lowest, known as the podium, for state officials; the next reserved for the wealthy or the nobles; and those above for the rest of the populace. Each of these were divided into wedge shaped sections (*cunei*) by radial walks and from them many exits (*vomitoria*) led down to the passages below the seats and so to the street. Apparently seats were always reserved, as they are usually carefully numbered; and tickets of clay bearing the seat numbers have been found. The seats were supported on

walls running radially to the exterior between which the exit stairs were most ingeniously arranged so that the enormous crowds were distributed evenly to the exit arches which surrounded the ground storey. In addition, vaulted corridors ran elliptically around the outside, connecting the various radial elements; the arcaded exterior was, therefore, a necessary and logical expression of the construction.”

The Lempert patent 304,532 discloses nothing more than a seating arrangement in an indoor theatre house, with two seat-supporting areas, each with steps and the seats set on the steps. This patent does not disclose the drive-in theatre of the Hollingshead patent. Thus, so far as its relevance to the Hollingshead patent is concerned, the Lempert patent is nothing more than an indoor theatre house.

In the Lempert patent, as in indoor theatre houses, there are rows of seats arranged either on continuous seat-supporting surfaces which are continuously slanted from back to front or on a successive series of steps as in Lempert. The common characteristic and inescapable incident of all such indoor theatre houses, is that the view of any patron can be and is frequently obstructed by the person directly ahead of him depending on the relative [232] sizes of the persons in the front or the back, the size hat worn in the front and whether the person in the front happens to be standing up either leaving or entering his seat or for any other reason. Thus, anyone who has been to any conventional theatre or

movie house or to a baseball game or football game (viewed from a stadium seat) has had the experience of having his view obstructed by the persons in front either when they leave or enter their seats or when they stand up as the result of some exciting event in the performance. Hence the familiar cry immediately after some exciting play at a baseball game: "down in front." Everyone is likewise familiar with the annoyance of having the person ahead of him get up too frequently during a theatre or opera performance to get something out of his coat pocket or to leave or enter, or to find that some lady in the row immediately ahead wears a view-obstructing hat or that the people ahead are of such large stature and lean toward each other so as to obstruct the view of the person immediately behind them. These characteristics and incidents inhere on all the prior-art relied upon by defendants, and if these undesirable characteristics and incidents of indoor theatres and movie houses and of baseball stadiums and football stadiums could have been eliminated by any practical means known, they would have been eliminated long before this. So far as I know, no indoor theatre house or movie house or baseball stadium or football stadium has ever been built in which these undesirable characteristics have been eliminated. Thus, I know of no theatre house or movie house and I know of no football stadium or baseball stadium in which the sight-line of the patron or spectator (to the stage, screen or field-of-action) is not obstructed occasionally, if not indeed frequently, by other patrons or spectators



entering or standing up in front of their seats either as a result of the excitement of the person or game or to get something out of their pockets, nor do I know of any theatre house or motion picture house in which a woman with a large hat or indeed a man of exceptionally large stature and broad shoulders will not obstruct the view of a patron immediately behind them of lesser stature, even though such person in the front remains seated.

All these characteristics are equally true of the structure of the Lempert theatre and of the theatre of the Torgersen patent 1,397,064.

In the drive-in theatre construction of the Hollingshead patent, though the automobiles which constantly enter and leave in a direction transversely of the sight-lines, are much more bulky than any one human being, there is no obstruction whatever of the sight-lines of spectators by the cars entering or leaving though they enter and leave directly in front of the spectators, nor is there any obstruction by such cars when in viewing positions directly ahead.

Thus, the very real problem which has existed and still exists in indoor theatre houses and movie houses, notwithstanding all the inventive skill and ingenuity expended upon indoor theatre houses and movie houses in an effort to improve them, has been completely solved in the drive-in theatre of the Hollingshead patent under the most adverse conditions for good visibility.

Thus, the aforesaid visibility problems which still inhere in all theatre houses and movie houses would



at once be accentuated and made ever so much more difficult of solution if the size of the spectator in front were materially increased (even if to half the size of an automobile) and if, in addition, each spectator's vertical angle of vision were further physically confined by a solid wall a foot or three feet in front of him through which he had only an opening the size of the windshield opening of a car. [234]

Nevertheless, with the added obstacles of the enormously larger size of an automobile (as contrasted with the size of a human body) and the further obstacle of having the vertical angle-of-vision from the front seat and particularly the back seat of the car confined to a small vertical angle by the upper and lower limits of the windshield, the drive-in theater construction defined by the claims of the Hollingshead patent provides a complete and effective solution of this acute visibility problem and provides a drive-in theatre theretofore unknown and since universally accepted throughout the United States and forming the basis of a new and large and highly profitable industry.

Such patents as the McKay patent, the Keefe patent and the Hale patent are quite irrelevant as a reference to their specifications and drawings will show at a glance.

Equally irrelevant are the other patents cited by the defendants as can be seen from their drawings and specifications.

None of the prior-art relied upon by defendants discloses a theatre construction in which a successive series of rearwardly-tilted car-supporting and

car-aiming surfaces are provided, separated by driveways wider than these car-supporting surfaces and in which the driveways are substantially depressed below the level of the high front-edge of the car-supporting or car-aiming surface immediately behind it, so that the cars can pass to and fro on the driveway below the lowest line of vision of the occupants in the cars on the car-supporting surface immediately behind the driveway, and in which the successive car-aiming surfaces are successively at a higher elevation in respect to each other.

No such construction or arrangement is disclosed in any of the prior-art nor have I ever seen any theatre [235] construction or any other construction in which this arrangement was present prior to the advent of the Hollingshead drive-in theatre.

I am in constant contact with engineers and belong to a number of engineering societies and have trained and supervised many other engineers both young and of various ages, and in my professional activities for more than 20 years I have also been in constant contact with architects in connection with various professional projects on which I have worked.

To bring into being the drive-in theatre disclosed in the Hollingshead patent and defined by the claims thereof required the exercise of the inventive faculty and indeed, required the exercise of invention of a high order, at the time when Hollingshead made his invention or as of the filing date of his patent.

No engineer or architect or any other person skilled in any of the related arts could have brought

into being the drive-in theatre disclosed and claimed in the Hollingshead patent merely by applying ordinary mechanical skill to the "prior-art." Indeed no engineer, architect or other person skilled in any of the related or analogous arts ever conceived or brought into being a drive-in theatre like that disclosed in and defined by the claims of the Hollingshead patent, prior to Hollingshead.

/s/ SAMUEL HERBERT TAYLOR  
JR.

Sworn to and subscribed before me this 14th day of February, 1950.

[Seal] /s/ WILLIAM KEENAN,  
Notary Public.

My Commission Expires March 5, 1953. [236]

[Title of District Court and Cause.]

AFFIDAVIT OF A. C. BOYLE IN  
OPPOSITION AND REPLY TO

- 1) Defendants' Motion for Dismissal  
(filed on or about December 8, 1949)  
and
- 2) Affidavit of C. A. Miketta  
(dated December 8, 1949)  
and
- 3) Defendants' Motion for Summary Judgment  
(filed on or about December 21, 1949)  
and
- 4) Affidavit of C. A. Miketta  
(dated December 21, 1949)

State of Pennsylvania,  
County of Philadelphia—ss.

A. C. Boyle, being duly sworn, deposes and says:  
I am a citizen of the United States, residing at 3254 Rutledge Walk, Camden, New Jersey, and I have been connected with Park-In Theatres, Inc., plaintiff, since its incorporation and I have been its secretary since February, 1941, and since [237] December, 1949, I have occupied a corresponding position with Park-In Theatres Company, a co-partnership.

I am familiar with Hollingshead patent 1,909,537 and with the litigation under said patent.

I deny the statements contained in lines 13 to 27, inclusive, of page 7 of defendants' Motion for Dismissal filed on or about December 8, 1949, and aver, on the contrary, that plaintiff always believed and now believes that its patent here in suit is valid, and plaintiff has never harassed defendants or the trade and has never imposed any high royalty burden on any drive-in theatres, and I further aver that the present suit was instituted against defendants in good faith believing that the patent was valid as plaintiff had a right to believe in view of its issuance and in view of the decision of the U. S. Court of Appeals for the 9th Circuit in *Park-In vs. Rogers* 130 F. 2d 745 and in view of the decision of the U. S. District Court for the District of Rhode Island in *Park-In vs. Loew* 70 F. Supp. 880, and I further aver that defendants have not been injured in any way whatever by the present suit.

I further state that plaintiff has not avoided any issues and has not refused to answer any request for admissions and that none of its answers to requests for admissions have been either argumentative or false and I further aver that defendants have not been caused to incur any needless and unnecessary expense in this action.

I further aver, upon information and belief, that in pursuance of his authority and duty under the Statute (35 U.S.C. 36) the Commissioner of Patents caused an examination to be made of Richard M. Hollingshead Jr.'s drive-in theatre which formed the subject-matter of the aforesaid patent application Serial No. 627,704, and in the course of such



examination caused a search to be made through all relevant classes or categories of prior [238] patents and prior publications, to determine whether Richard M. Hollingshead Jr.'s aforesaid drive-in theatre was new and patentable, and upon such examination and upon the consideration of all relevant prior patents and publications and upon the consideration of all relevant prior knowledge and prior uses within general knowledge, the Commissioner of Patents and those acting under him in an official capacity, under the Statute (35 U.S.C. 36), determined that Richard M. Hollingshead, Jr., was justly entitled to a patent, under the law, upon his drive-in theatre, and, thereupon, the Commissioner of Patents did on May 16, 1933, duly and legally issue Letters Patent No. 1,909,537 of the United States to Richard M. Hollingshead, Jr., on his said drive-in theatre.

I further aver, on information and belief, that all the many forms of conventional indoor theatre constructions and arrangements and constructions and arrangements in the Coliseum in Rome and the stadium at Soldier Field at Chicago and other well known stadii and auditoriums, were all matters of common knowledge both to the Patent Examiners and to the Commissioner of Patents who examined the aforesaid Hollingshead patent application Serial No. 627,704 and issued plaintiff's Hollingshead patent 1,909,537, as well as to the United States Court of Appeals for the 9th Circuit which decided the case of *Park-In vs. Rogers*, 130 F. 2d 745, and that all the prior patents cited in defendants' Answer

filed herein on or about December 7, 1948, and the aforesaid Motion for dismissal and the affidavit of C. A. Miketta dated December 8, 1949, and defendants' Motion for Summary Judgment filed on or about December 21, 1949, and the affidavit of C. A. Miketta dated December 21, 1949, were all known to the Examiner and the Commissioner of Patents when they examined and considered Hollingshead's aforesaid application Serial No. 627,704 and when they granted Hollingshead patent No. 1,909,537 here in suit, and that, therefore, when said officials of the Patent Office issued said patent [239] and when the Court of Appeals for the 9th Circuit sustained said patent in the above-cited decision, they did so with a full knowledge of what conventional theatre constructions and arrangements were and what the arrangements and constructions were in the Coliseum in Rome and in many other conventional stadii and auditoriums, and that had either the officials of the Patent Office deemed such conventional theatre constructions and the Coliseum and stadii and auditoriums, or any of the aforesaid prior patents relied upon by defendants, as negating invention in the drive-in theatre construction defined by the claims of the Hollingshead patent here in suit, such patent would not have been issued, and had the Court of Appeals for the 9th Circuit in *Park-In vs. Rogers*, *supra*, regarded such conventional theatre constructions and the Coliseum in Rome and the other well known stadii and auditoriums as negating invention in the drive-in theatre construction defined by the claims of the Hollingshead patent in suit, such

Court would not have reversed the District Court's summary judgment of dismissal.

I state, on information and belief, that the first drive-in theatre of patent No. 1,909,537 was built in Camden, New Jersey, in the early part of 1933 by the Camden Drive-In Theatres, Inc., a New Jersey corporation, which was an affiliate of plaintiff, in that its capital stock was owned by plaintiff's stockholders in the same ratio as they owned plaintiff's stock, said stockholders being principally the patentee Richard M. Hollingshead, Jr., and his chief financial backer Willis Warren Smith, and said first drive-in theatre of patent 1,909,537 was opened by plaintiff's said affiliate in the middle of 1933, and was operated for several years, namely to and including the drive-in theatre season of 1936, but plaintiff's said affiliate was forced to close and dismantle said first drive-in theatre after several years' operation because the owners and operators of [240] conventional motion-picture theatre houses in the Camden-Philadelphia area, in combination and in a conspiracy with the distributors and producers of motion-picture films, put into effect and at all times practiced a film-boycott against said plaintiff's aforesaid first drive-in theatre, which boycott consisted in all the film-distributors refusing to supply film to plaintiff's aforesaid Camden drive-in theatre except film which was two, three or four years old (or older) and in charging for such old films a rental price so substantially higher than what was charged for the same film, at the same age, to the owners and operators of the conventional motion-picture theatre

houses in the Philadelphia-Camden area, as to make the operation of plaintiff's aforesaid first drive-in theatre unprofitable because of the trade practices which were later condemned by the Supreme Court of the United States in the case of *United States vs. Paramount Pictures, Inc., et al.*, reported at 66 F. Supp. 323, and at 334 U. S. 131, and in the case of *United States vs. Griffith et al.*, reported at 334 U. S. 100 and in the case of *United States vs. Schine Chain Theatres, Inc., et al.*, reported at 334 U. S. 110.

I state, on information and belief, that, as a result of economic duress arising from the aforesaid film-distributing practices, plaintiff was forced to abandon further efforts to build and operate its own drive-in theatres of patent No. 1,909,537, and was forced to turn over the commercial operation of the invention of its patent 1,909,537 largely to licensees at inadequate royalty rates not commensurate with the benefits derived from said invention by such licensees, and t royalty rates less than a reasonable royalty or due compensation for the making, using or selling of the invention of patent No. 1,909,537.

I state, on information and belief, that the drive-in theatre invented by Richard M. Hollingshead, Jr., and forming the subject-matter of plaintiff's Hollingshead patent No. 1,909,537, [241] was entirely unknown and unanticipated in the United States, or elsewhere, prior to the time when Richard M. Hollingshead, Jr., invented such drive-in theatre, and such invention by Richard M. Hollingshead, Jr., constituted an original inventive contribution of



great value and benefit to the public at large, and the public has recognized the merit of said invention by patronizing, to an ever increasing extent, the drive-in theatres of patent 1,909,537, many of which have been built and constructed and used throughout the United States, solely and directly as a result of such drive-in theatre having thus been made available to the public through said invention by R. M. Hollingshead, Jr.

I state, on information and belief, that the drive-in theatres of the Hollingshead patent No. 1,909,537 have been of great benefit and value both to the film-producing and film-distributing branches as well as to the picture-exhibiting branch of the motion picture industry, because said drive-in theatres have increased motion-picture attendance over and above what it would have been otherwise, and the return on investment in drive-in theatres of the Hollingshead patent No. 1,909,537 has generally been substantially greater than the return on the investment in the conventional motion-picture theatre houses, and motion-picture exhibitors have profited from such use and commercial exploitation of said invention generally to an extent substantially greater than the profits which they could realize on the building and operation of conventional motion-picture theatre houses with like investments.

I state, on information and belief, that prior to the filing date of the application upon which Hollingshead patent No. 1,909,537 was issued, no motion-picture theatre of any kind or construction was ever built, used or operated in the United States or



in any foreign country, in which the patrons viewed the motion-picture from the seats of their own automobiles [242] (driven to the theatre), through the windshields thereof, and, prior to such filing date, the term or phrase "drive-in theatre" was unknown and did not appear in any publication in this or any foreign country; the term or phrase "drive-in theatre" having been coined by Richard M. Hollingshead, Jr. (prior to said filing date) as the name for his invention which forms the subject matter of his patent No. 1,909,537.

I state, on information and belief, that patent No. 1,909,537 is the first patent ever issued in this or any foreign country on a motion-picture theatre in which the patrons view the picture from the seats of their own automobiles through the windshields thereof, and the Hollingshead patent No. 1,909,537 is a pioneer patent.

I state, on information and belief, that for many years after the filing date and after the issue date of Hollingshead patent No. 1,909,537, and until some time after December 31, 1940, there were no motion-picture exhibition places ever built or used in this or in any foreign country, other than the drive-in theatres of patent No. 1,909,537, in which patrons viewed the motion-picture show from the seats of their own automobiles, through the windshields thereof.

I state, on information and belief, that some time after December 31, 1940, and more particularly since some time after about the middle of 1946, others not in any way connected with plaintiff, built and put

into operation outdoor motion-picture exhibition places, sometimes called a "flattie" or "flatties," consisting generally of a flat piece of ground upon which a screen was erected and on which the patrons' own cars were placed, facing the screen, in order that the occupants of the cars might view or try to view the motion-picture, from their seats, through the windshields of the cars. [243]

I state, on information and belief, that the aforesaid "flatties" have been generally unsuccessful as genuine motion-picture exhibition places, and have not commanded as much patronage nor as high an admission price as the drive-in theatres of Hollingshead patent No. 1,909,537, and many "flatties" have been abandoned after a short period of operation, because they were found to be impractical and because of lack of adequate public acceptance.

I state, on information and belief, that no "flattie" type of motion-picture exhibition place nor any other motion-picture exhibition place not embodying the subject-matter of patent No. 1,909,537 but in which the patrons viewed or tried to view the motion picture from the seats of their own automobiles through the windshields thereof, has ever been built within competitive distance of a drive-in theatre of patent No. 1,909,537 because such flatties or other motion-picture exhibition places not embodying the subject-matter of patent No. 1,909,537 are substantially inferior to the drive-in theatres of patent No. 1,909,537 and for that reason could not successfully compete therewith. [244]

The first drive-in theatre ever built, namely, plain-

tiff's drive-in theatre built in 1933 was such a completely new thing that it received extensive and favorable comment in many trade publications of the motion picture and entertainment industry, at the outset, and was the subject of news broadcast by Lowell Thomas on May 19, 1933, as follows:

“Did you ever hear of a theatre where you could drive right into the auditorium, sit in your car, and watch the show?”

“Neither did I until today.

“According to the Film Daily of New York, down in Camden, New Jersey, they have what is said to be the first drive-in theatre in the world. It covers 250,000 square feet of ground on Admiral Wilson Boulevard. It will accommodate 400 cars with, I suppose, from three to ten people squeezed into each car and all the tanks filled with Blue Sunoco, I hope.

“Seven rows of inclined grades, sort of sloping terraces will enable the occupants of each car to have a direct view of the motion picture screen.

“The establishment will have a modern sound equipment and will specialize mainly in shorts, news reels, travel pictures, and so on, which seem to be the rage of the world these days. Again New Jersey leads the world and what an ideal place for one arm drivers.”

Attached hereto as Exhibit 2 is copy of pages 15, 16, 17 and 42 of the July 1, 1933, issue of the “Bet-

ter Theatres Section” of the trade magazine “Motion Picture Herald.”

I attach hereto as Exhibit 3 a copy of page 17 of the magazine section known as “Everybody’s Weekly” in the May 16, 1948, issue of The Philadelphia Inquirer, containing an article by Edgar Williams entitled “Growth of Drive-In Movies.”

I attach hereto as Exhibit 4 copies of pages 13 and 16 of the July 17, 1948, issue of the trade magazine “Motion Picture Herald” containing an article entitled “The Roof’s the Sky and Sky Is Drive-In Limit.”

I attach hereto as Exhibit 5 a copy of page 11 of the July 17, 1948, issue of “Boxoffice” containing an article entitled “50 Drive-Ins at Pittsburgh, as Outdoor Theatres Boom.” [245]

I attach hereto as Exhibit 6 a copy of page 25 of the November 13, 1948, issue of “Boxoffice” containing an article by Sumner Smith entitled “Drive-Ins Up from 100 to 761 in 20-Month Building Boom.”

I attach hereto as Exhibit 7 a copy of an excerpt from page 12 of the June 11, 1949, issue of “Boxoffice” under the heading of “Men and Events” by James M. Jerauld.

I attach hereto as Exhibit 8 a copy of page 15 of the June 11, 1949, issue of “Motion Picture Herald” containing an article entitled “Bigger and Better Drive-Ins Boom” and “Motor Movies Weaving New Spell for Patron.”

I attach hereto as Exhibit 9 a copy of page 84 of the June 20, 1949, issue of the magazine “Time”



containing an article in the Cinema section on drive-in theatres.

I attach hereto as Exhibit 10 a copy of page 42 of the July 23, 1949, issue of the trade magazine called "Boxoffice," containing an article on the views of William F. Rodgers, vice president of MGM, concerning the drive-in theatre as a factor in the motion picture industry.

I attach hereto as Exhibit 11 a copy of page 10 of the July 30, 1949, issue of The Independent Film Journal, containing an article showing the views of William F. Rodgers, vice president of MGM, on the drive-in theatre industry.

I attach hereto as Exhibit 12 a copy of excerpts from page 5 of the August 24, 1949, issue of the trade magazine "The Exhibitor."

I attach hereto as Exhibit 13 a copy of page 20 of the October 1, 1949, issue of the magazine "The New Yorker" containing an interview with one of the leading motion picture theatre operators, concerning the drive-in theatre.

I attach hereto as Exhibit 14 a copy of page 10 of the October 8, 1949, issue of the trade magazine "Boxoffice" containing an article entitled "Drive-In Clearance Rights Placed Before [246] the Court," relating to the discriminatory film-distributing practices still in vogue against drive-in theatres.

I attach hereto as Exhibit 15 a copy of the cover page of one of the regular program booklets put out by the Weymouth Drive-In Theatre of Weymouth, Massachusetts, in July of 1937 showing a schematic diagram of the car-aiming and sight-



clearance arrangement of the drive-in theatre. I am informed and I aver on information and belief that this diagram was published for the benefit of the patrons and prospective patrons because of the general skepticism prevailing throughout the public, as to the practicability and operability of a drive-in theatre in which successive rows of cars are placed one behind the other. Thus, there was for many years after the introduction of the drive-in theatre of 1933, a general skepticism as to how the occupants of each automobile could have full visibility of the screen from the front seat as well as the rear seat, without their view being obstructed by the cars ahead and without their view being obstructed by the moving of the cars in front of them and that this skepticism was due to the fact that people just couldn't figure out how there could be any construction or arrangement in a drive-in theatre which would give such visibility in view of the bulkiness of the cars ahead and in view of the bulkiness of the cars which would pass in front of the viewer as the cars moved in and out of the theatre.

I state on information and belief that the Encyclopedia Britannica, 14th Edition, Volumes I and XXI, upon which defendants rely upon their motion for summary judgment, was published in 1945.

All underscoring has been supplied in these exhibits. [247]

Plaintiff's Managing Director, Willis Warren Smith, who made plaintiff's sworn response under Rule 36-a(1) which was filed on February 23, 1949, and who made the Affidavit dated February 19,

1949, in support of plaintiff's Motion under Rule 6-b(2) which was filed on February 23, 1949, is, and for some time has been, abroad and will not be back in the United States until some time in the early part of March, 1950.

/s/ A. C. BOYLE.

Sworn to and subscribed before me this 14th day of February, 1950.

[Seal] /s/ WILLIAM M. KEENAN,  
Notary Public.

My Commission Expires March 5, 1953. [248]

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EXHIBITS No. 2 TO No. 15, INCLUSIVE

[Exhibits 2 to 15 inclusive attached to the foregoing affidavit and contained in volume II, pages ~~250~~ to

~~267.]~~

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In the United States District Court, Southern  
District of California, Central Division

No. 8582-C

PARK-IN THEATRES, INC.,

Plaintiff,

vs.

SETH D. PERKINS, et al.,

Defendants.

### MEMORANDUM DECISION

James M. Carter, U. S. District Judge.

The above matter heretofore submitted, is decided as follows:

Defendants' motion for summary judgment is granted on the following grounds:

(1) Patent in suit is invalid for the reason stated by the United States Court of Appeals for the First Circuit, 174 F. 2d, 547;

(2) Patent in suit is invalid as a matter of law, for lack of invention over the prior art;

(3) Patent in suit is invalid for the reason it fails to define and claim invention in such full, clear, concise and exact terms as are required by 35 U.S.C.A., Sec. 33 [Rev. Statutes 4888];

(4) Patent in suit is invalid in that functional language has been used.

The clerk will forward copies of this memoran-

dum decision to counsel. Defendants will prepare findings of fact and conclusions of law and judgment within the time prescribed by the Rules.

[Endorsed]: Filed March 27, 1950. [272]

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[Title of District Court and Cause.]

OBJECTIONS TO PROPOSED FINDINGS OF  
FACT, CONCLUSIONS OF LAW AND  
JUDGMENT

Now comes the plaintiff in the above-entitled action and makes the following objections to the proposed findings of fact and conclusions of law and to the proposed judgment:

I.

Plaintiff objects to paragraph 4 as worded. The invention claimed in the patent in suit is for a combination of elements. The admission was made that in the action the plaintiff would rely upon invention residing in the combination and not in any particular element. There was no admission that the elements were individually old or were well known more than two years prior to the filing of the patent in suit. There are cases which hold in determining the validity of a combination claim that the elements may be considered separately as old. However, the finding that the plaintiff admitted said elements were individually old should not be made. [273]

II.

Objection is made to proposed finding of fact 5 on the ground that said finding is not supported in the showings made to the court.

III.

Objection is made to proposed finding 6 on the ground that the patents and publications are before the court and speak for themselves and it is not necessary to make any finding as to the disclosures therein.

IV.

Objection is made to proposed findings 7, 8 and 9, on the ground that the claims in issue are in the patent and before the court and it is not necessary in any finding on the question of indefiniteness to interpret said claims or go into detail concerning the wording thereof.

V.

Objection is made to proposed conclusion of law 5 that there is no basis in the showing before the court for holding that any of the claims in issue are anticipated by prior art patents and publications.

VI.

Objection is made to inclusion in the conclusions of law and in the judgment that any attorney's fees be awarded to the prevailing part and in connection



therewith reference is made to a separate memorandum filed herein pertaining thereto.

LYON & LYON,

/s/ R. E. CAUGHEY,

Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed April 6, 1950. [274]

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MINUTES OF APRIL 12, 1950

At a stated term, to wit: The February Term, A.D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday, the 12th day of April, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable James M. Carter,  
District Judge.

[Title of Cause.]

ORDER OVERRULING PLAINTIFF'S  
OBJECTIONS, ETC.

It Is Ordered:

(1) That the plaintiff's objections to the defendants' proposed findings are overruled, except that at the end of finding of fact No. 4 the following words will be added: "but claims invention in the

combination of the elements. There is no invention in the alleged combination.”;

(2) That the additional findings suggested as Nos. 10 and 11 in defendants’ memorandum will be made a part of the findings;

(3) That attorneys’ fees be and they are allowed in the sum of \$3,400.00;

(4) That attorney for defendants will prepare revised findings accordingly and submit same forthwith. [284]

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[Title of District Court and Cause.]

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

This cause coming before this Court on a Motion for Summary Judgment brought by defendants herein under Rule 56 F.R.C.P. and the Court having considered the pleadings, admissions, interrogatories, affidavits and exhibits on file and the decision of the United States Court of Appeals for the First Circuit involving the same plaintiff and Letters Patent, and it appearing that the moving party is entitled to judgment as a matter of law, and the Court having rendered its decision, does hereby make the following findings of fact and conclusions of law: [285]

Findings of Fact

1. Plaintiff Park-In Theatres, Inc., is a New Jersey corporation having its place of business at Camden, New Jersey.

Defendants Seth D. Perkins and George E. Mitzel are citizens of California and inhabitants of this District and Division.

Defendants La Vere Co. and Drive-In Theatres of America, and each of them, are California corporations and inhabitants of this District and Division.

2. Plaintiff's complaint alleges ownership of United States Letters Patent No. 1,909,537 and charges the defendants with infringement of claims 2, 4, 5, 6, 10, 15, 16 and 19 thereof.

3. United States Letters Patent No. 1,909,537 is entitled "Drive-In Theater" and was issued May 13, 1933. The patent has been held invalid by the United States Court of Appeals for the First Circuit in April, 1949, and the decision of said Court being reported at 174 F(2) 547 and certiorari denied (70 S. Ct. 68). The decision of the United States Court of Appeals for the First Circuit, as it is directed to lack of invention and invalidity of the patent in suit, is adopted herein.

4. Plaintiff admits and the Court finds that the elements described and claimed in the patent in suit No. 1,909,537, are individually old and were well known more than two years prior to the filing of the patent in suit. Plaintiff does not contend that there is invention in any single element of the claims of the patent in suit but claims invention in the combination of the elements. There is no invention in the alleged combination.

5. More than two years prior to the filing of the patent in suit (a) it was customary to use inclined or sloping floors in theaters; (b) it was customary to arrange seats in an [286] arcuate arrangement, the seats facing the stage or screen; (c) it was customary to terrace the floor or ground as a means of permitting occupants of rearward terraces a clear field of vision ahead. The adoption of the teachings of the prior art and normal theater construction to a theater wherein spectators sit on seats in an automobile instead of seats directly on the floor or ground, is within the skill of anyone who puts his mind on the problem. The selection and aggroupment of old elements for substantially the same purpose would readily occur to anyone skilled in the art of construction without an exercise of the faculty of invention.

6. Prior art patents and publications show that curvilinear rows of means for occupancy by spectators have been provided since ancient times (*Encyclopaedia Britannica*, 14th Ed., 1929, Vol. 1, pages 847 and 848 and Vol. 21, Plates I and II, following page 272; defendants' Exhibits A1, A2, A3 and A4); terracing of stadia and floors of theaters is shown in the *Encyclopaedia Britannica* and United States Letters Patent No. 304,532 (Ex. B1) and United States Letters Patent No. 366,290 (Ex. B2); placement of seats upon an incline is shown in United States Letters Patent No. 800,100 (Ex. B6); seats arranged in terraces are shown in United States Letters Patent No. 612,117 (Ex. B3). More than

two years before the filing of the patent in suit it was customary to point vehicles toward the desired view (Letters Patent No. 810,646 and No. 836,708, Ex. B7 and Ex. B9, respectively). Patents published and known in the United States more than two years before the filing date of the patent in suit showed vehicles whose occupants looked at motion picture screens (United States Letters Patent No. 1,145,946, Ex. B11) while vehicles were in side-by-side relation (United States Letters Patent No. 1,238,151, Ex. B13); a vehicle positioned upon an incline and pointed toward a motion picture screen is shown in United States Letters Patent No. 778,325 issued in 1904 (Ex. B5). [287]

7. The claims of the patent in suit attempt to claim a scheme for parking automobiles in an open lot so that occupants of the automobile will have a generally clear angle of vision of a stage or screen, but the claims do not show specifically how the desired objective is attained. Claims 5 and 6 refer to "an angle with respect to the screen" without specifying whether this is a vertical or a horizontal angle; claims 2 and 4 call for stallways "at a vertical angle with respect to the stage such as will produce a clear angle of vision" without stating the direction or magnitude of the angle; claim 15 similarly fails to define the direction or magnitude of the angle of inclination; claim 10 calls generally for "means \* \* \* to produce a generally clear angle of vision" without stating what or where such means are located or the inclination or direction of in-



inclination of such means; claims 16 and 19 refer to "inclined means" without defining the direction or magnitude of such inclination. The claims are indefinite.

8. Visibility of a motion picture screen by a spectator through a windshield of an automobile is affected by the relative height of the seat to the windshield and the height of the occupant of the car in relation to the seats and windshield of the car, as stated in the patent in suit. In addition, visibility of such motion picture screen is affected by: the height of the bottom of the screen above a horizontal plane passing through the seat upon which the spectator rests; the distance from the spectator's seat to the screen; the size of the screen; the distance between the seat and the windshield; the distance between automobiles; the overall height of the automobile; the effective vertical transparent height of the windshield of the automobile, etc. The patent in suit does not specify these controlling factors and does not define them in feet, inches, yards, meters, degrees, or any other unit of measurement and leaves the public to its own experimentation. The claims of the patent in suit are indefinite. [288]

9. The claims of the patent in suit No. 1,909,537 employ functional language instead of defining the arrangement in terms of structural relationships; the words "such as will produce a clear angle of vision" (claims 2, 4, 5 and 6) and "to produce a generally clear angle of vision" (claim 10), and "to an extent as will produce \* \* \*" (claims 16 and

19) are functional statements of a desired objective but do not state by what means and how such objective is to be attained. The claims of the patent in suit are indefinite and uninforming.

10. The affidavits filed by plaintiff in opposition to the motion for summary judgment are mostly on information and belief and not on personal knowledge (as required by Rule 56E), refer in large part to irrelevant matters, and do not contradict the showings of the prior patents.

11. The pleadings, interrogatories, answers thereto, requests for admissions and admissions thereto, and the objections, motions for extensions of time and other papers on file herein indicate that the action was brought upon surmise and suspicion and plaintiff repeatedly delayed proceedings.

#### Conclusions of Law

1. The Court has jurisdiction of the parties and of the subject matter.

2. United States Letters Patent No. 1,909,537 issued to R. M. Hollingshead, Jr., were assigned to and title thereto vested in plaintiff at the time this action was filed.

3. United States Letters Patent No. 1,909,537, and particularly claims 2, 4, 5, 6, 10, 15, 16 and 19 thereof, and each of them, are void and invalid for lack of novelty and invention.

4. United States Letters Patent No. 1,909,537, and particularly claims 2, 4, 5, 6, 10, 15, 16 and 19

thereof, and each of them, are void and invalid as a matter of law for lack of invention over the prior art. [289]

5. United States Letters Patent No. 1,909,537, and particularly claims 2, 4, 5, 6, 10, 15, 16 and 19 thereof, and each of them, are void and invalid and anticipated by prior structures, patents and publications.

6. United States Letters Patent No. 1,909,537, and particularly claims 2, 4, 5, 6, 10, 15, 16 and 19 thereof, and each of them, are void and invalid for the reason that they fail to define and claim the purported invention in such full, clear, concise and exact terms as are required by 35 U.S.C.A. Section 33 (Revised Statutes 4888).

7. United States Letters Patent No. 1,909,537, and particularly claims 2, 4, 5, 6, 10, 15, 16 and 19 thereof, and each of them, are void and invalid in that functional language has been used and the claims are indefinite and do not conform to the requirements of 35 U.S.C.A. Section 33 (Revised Statutes 4888).

8. An invalid patent cannot be infringed.

9. The complaint will be dismissed. Defendants shall recover from plaintiff their reasonable attorneys' fees in the sum of \$3,400.00 and costs and disbursements to be taxed by the clerk and have execution therefor. Costs taxed in the sum of \$.....

Dated this 13th day of April, 1950.

/s/ JAMES M. CARTER,  
Judge, U. S. District Court.

[Endorsed]: Filed April 13, 1950. [290]

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In the United States District Court, Southern  
District of California, Central Division

Civil Action No. 8582-C

PARK-IN THEATRES, INC.,

Plaintiff,

vs.

SETH D. PERKINS, GEORGE E. MITZEL, LA  
VERE CO., a California Corporation, and  
DRIVE-IN THEATRES OF AMERICA, a  
California Corporation,

Defendants.

#### SUMMARY JUDGMENT AND DECREE

This cause coming before this Court on a Motion for Summary Judgment brought by defendants herein under Rule 56 F.R.C.P. and the Court having considered the pleadings, admissions, interrogatories, affidavits and exhibits on file, and it appearing that the moving party is entitled to judgment as a matter of law, and the Court having rendered its decision, and upon the findings of fact and conclusions of law filed concurrently herewith,

It Is Hereby Ordered, Adjudged and Decreed by the Court as Follows: [291]

1. The Court has jurisdiction of the parties and of the subject matter.

2. United States Letters Patent No. 1,909,537 issued to R. M. Hollingshead, Jr., were assigned to and title thereto vested in plaintiff at the time this action was filed.

3. United States Letters Patent No. 1,909,537, and particularly claims 2, 4, 5, 6, 10, 15, 16 and 19 thereof, and each of them, are void and invalid for lack of novelty and invention.

4. United States Letters Patent No. 1,909,537, and particularly claims 2, 4, 5, 6, 10, 15, 16 and 19 thereof, and each of them, are void and invalid as a matter of law for lack of invention over the prior art.

5. United States Letters Patent No. 1,909,537, and particularly claims 2, 4, 5, 6, 10, 15, 16 and 19 thereof, and each of them, are void and invalid and anticipated by prior structures, patents and publications.

6. United States Letters Patent No. 1,909,537, and particularly claims 2, 4, 5, 6, 10, 15, 16 and 19 thereof, and each of them, are void and invalid for the reason that they fail to define and claim the purported invention in such full, clear, concise and exact terms as are required by 35 U.S.C.A. Section 33 (Revised Statutes 4888).



7. United States Letters Patent No. 1,909,537, and particularly claims 2, 4, 5, 6, 10, 15, 16 and 19 thereof, and each of them, are void and invalid in that functional language has been used and the claims are indefinite and do not conform to the requirements of 35 U.S.C.A. Section 33 (Revised Statutes 4888).

8. The complaint is hereby dismissed with prejudice. Defendants shall recover from plaintiff their reasonable attorneys' [292] fees in the sum of \$3400.00, and costs and disbursements to be taxed by the clerk, and have execution therefor. Costs taxes in the sum of \$53.38.

Dated this 13th day of April, 1950.

/s/ JAMES M. CARTER,

Judge, U. S. District Court.

Approved as to Form this . . . . day of March, 1950.

LEONARD L. KALISH,

LYON & LYON,

REGINALD E. CAUGHEY,

By.....,

Attorneys for Plaintiff.

Judgment entered April 14, 1950.

Receipt of Copy acknowledged.

Lodged April 1, 1950.

[Endorsed]: Filed April 13, 1950. [293]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the plaintiff, Park-In Theatres, Inc., hereby appeals to the United States Court of Appeals for the Ninth Circuit from the summary judgment and decree entered April 14, 1950, and particularly from Paragraphs 3 to 8, inclusive, thereof.

Dated: May 11th, 1950.

LYON & LYON,

/s/ REGINALD E. CAUGHEY,  
Attorneys for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed May 11, 1950. [295]

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[Title of District Court and Cause.]

PLAINTIFF-APPELLANT'S STATEMENT OF  
POINTS UNDER RULE 75-d

Pursuant to Rule 75-d of the Rules of Civil Procedure, the following is submitted as a statement of points upon which plaintiff-appellant intends to rely, on its appeal:

- 1) The District Court erred in holding, in its Memorandum Decision filed March 27, 1950,
  - a) that Hollingshead patent 1,909,537 in suit "is invalid for the reason stated by the United States

Court of Appeals for the First Circuit, 174 F. 2d 547” (instead of making its own independent determination of the question of validity), and [298]

b) that Hollingshead patent 1,909,537 in suit “is invalid as a matter of law, for lack of invention over the prior-art,” and

c) that Hollingshead patent 1,909,537 in suit “is invalid for the reason it fails to define and claim invention in such full, clear, concise and exact terms as are required by 35 U.S.C.A., Sec. 33 (Rev. Statutes 4888),” and

d) that Hollingshead patent 1,909,537 in suit “is invalid in that functional language has been used.”

2) The District Court erred, in its Order filed April 12, 1950,

a) in overruling plaintiff’s objections to defendants’ proposed Findings of Fact 4-9, inclusive and proposed Conclusion of Law 5 and proposed inclusion of attorney’s fees, and

b) in holding that additional suggested findings 10 and 11 be made a part of the Findings of Fact, and

c) in allowing attorney’s fees in the sum of \$3400.

3) The District Court erred in its Findings of Fact and Conclusions of Law, as filed April 14, 1950, in the following respects:

a) the last sentence of Finding 3 is improper (and deprives plaintiff-appellant of its right to obtain an independent adjudication of validity in the District Court);

b) the last sentence of Finding 4 is erroneous and is not supported in the showing made to the Court;

c) Finding 5 is erroneous and is not supported in the showing made to the Court; [299]

d) Finding 6 is erroneous and is not a proper Finding of Fact and, instead, merely sets forth counsel's conclusions and interpretations of the disclosures of certain patents and publications which speak for themselves;

e) Finding 7 is erroneous and is not a proper Findings of Fact and, instead, merely sets forth counsel's conclusions and interpretations as to the definiteness and sufficiency of the claims in suit, which claims speak for themselves;

f) Finding 8 is erroneous and is not a proper Finding of Fact and, instead, is simply counsel's opinion as to the factors affecting visibility of a motion picture screen (in the nature of a hypothetical discussion having no foundation in the showings made to the Court) and counsel's conclusions and opinion as to the adequacy of disclosure and definiteness of claims of the patent in suit;

g) Finding 9 is erroneous and is not a proper Finding of Fact and, instead, is merely counsel's conclusions and interpretations of the claims of the patent in suit;

h) Finding 10 is erroneous and is not a proper Finding of Fact and, instead, is merely counsel's conclusion and opinion as to affidavits which speak for themselves;

i) Finding 11 is erroneous and is not supported in the showings made to the Court;

j) Conclusion 3 is erroneous and is not supported by the showing made to the Court and is improper insofar as it attempts to adjudicate the validity of Hollingshead patent 1,909,537 with respect to those claims which were not in suit; [300]

k) Conclusion 4 is erroneous and is not supported in the showing made to the Court and is improper insofar as it attempts to adjudicate the validity of Hollingshead patent 1,909,537 with respect to those claims which were not in suit;

l) Conclusion 5 is erroneous and is not supported in the showing made to the Court and is improper insofar as it attempts to adjudicate the validity of Hollingshead patent 1,909,537 with respect to those claims which were not in suit;

m) Conclusion 6 is erroneous and is not supported in the showing made to the Court and is improper insofar as it attempts to adjudicate the validity of Hollingshead patent 1,909,537 with respect to those claims which were not in suit;

n) Conclusion 7 is erroneous and is not supported in the showing made to the Court and is improper insofar as it attempts to adjudicate the validity of Hollingshead patent 1,909,537 with respect to those claims which were not in suit;

o) Conclusion 8 is erroneous and is in conflict with the well settled principle that a District Court should decide all issues going to infringement as well as validity so that, in the event that its decision on validity is reversed on appeal, there will be no



need to send the case back for trial on the issue of infringement;

p) Conclusion 9 is erroneous insofar as it awards attorney's fees in the sum of \$3400, and is not supported by the showing made to the Court, and without having afforded plaintiff any opportunity to examine the attorneys in open Court as to their claimed fees, and is [301] in conflict with the well settled principle that attorney's fees are not awarded in ordinary patent cases and in the absence of unusual circumstances (such as were not shown to be present in the case at bar).

4) The District Court erred in entering summary judgment holding the patent in suit invalid (in the absence of any fully anticipatory prior-art) without affording plaintiff an opportunity to prove its case (independently of the decision of the First Circuit) by a full and complete trial on the merits.

5) The District Court erred in awarding defendants attorney's fees in the sum of \$3400 in the complete absence of any showing of unusual circumstances justifying the award of any attorney's fees whatever and in the complete absence of any factual showing as to the nature and extent of the services rendered by defendants' attorneys (other than a mere statement as to the total amount of services billed and to be billed, but without any

breakdown as to time spent, to justify the size of the fees claimed).

LYON & LYON,

/s/ LEONARD S. LYON,

/s/ REGINALD E. CAUGHEY,

Attorneys for Plaintiff.

/s/ LEONARD L. KALISH,

Counsel for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed July 14, 1950. [302]

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[Title of District Court and Cause.]

PLAINTIFF-APPELLANT'S DESIGNATION  
OF CONTENTS OF RECORD ON APPEAL

In accordance with the provisions of Rule 75-a of the Rules of Civil Procedure, plaintiff-appellant designates the following portions of the record, proceedings and evidence to be contained in the record on appeal:

- 1) Complaint, as filed August 27, 1948.
- 2) Answer, as filed December 7, 1948.
- 3) Defendants' Request for Admissions, as filed January 28, 1949.
- 4) Plaintiff's Response under Rule 36-a(1) to part of Defendants' Request for Admissions, as filed February 23, 1949. [303]
- 5) Plaintiff's Objections under Rule 36-a(2) to

part of Defendants' Request for Admissions, as filed February 23, 1949.

6) Order upon Plaintiff's Objections to Defendants' Request for Admissions under Rule 36, as filed March 25, 1949.

7) Plaintiff's Answer to Defendants' Request for Admissions numbered "15," as filed April 13, 1949.

8) Defendants' Motion for Dismissal, as filed December 9, 1949, together with Affidavit of C. A. Miketta, dated December 8, 1949, filed in support thereof.

9) Order entered December 19, 1949, on Defendants' Motion for Dismissal.

10) Defendants' Motion for Summary Judgment, as filed December 22, 1949, and Affidavit of C. A. Miketta dated December 21, 1949, filed in support thereof, and exhibits filed in support thereof.

11) Affidavit of C. A. Miketta, dated January 30, 1950, as to his charges, as filed January 30, 1950.

12) Affidavit of Don A. Ladenberger, dated January 30, 1950, as to charges of Johnson & Ladenberger, as filed January 30, 1950.

13) Affidavit of Samuel Herbert Taylor, Jr. (in opposition to Defendants' Motion for Dismissal and in opposition to Defendants' Motion for Summary Judgment), dated February 14, 1950, as filed February 16, 1950.

14) Affidavit of A. C. Boyle (in opposition and reply to Defendants' Motion for Dismissal and Motion for Summary Judgment and Miketta affidavits) dated February 14, 1950, and exhibits attached thereto, as filed February 16, 1950.

15) Memorandum Decision granting Defendants' Motion for Summary Judgment, as filed March 27, 1950. [304]

16) Plaintiff's Objections to Proposed Findings of Fact, Conclusions of Law and Judgment, as filed April 6, 1950.

17) Minute Order overruling Plaintiff's Objections, etc., as filed April 12, 1950.

18) Findings of Fact and Conclusions of Law, as filed April 14, 1950.

19) Notice of Appeal, as filed May 11, 1950.

20) Order dated June 16, 1950, extending time for docketing appeal to July 20, 1950, as filed June 16, 1950.

21) Order dated July 11, 1950, further extending the time for docketing appeal to August 9, 1950, as filed July 12, 1950.

22) Plaintiff-appellant's Statement of Points under Rule 75-d, as served and filed simultaneously herewith.

23) This Designation.

24) Docket Entries.

LYON & LYON,

/s/ LEONARD S. LYON,

/s/ REGINALD E. CAUGHEY,  
Attorneys for Plaintiff.

/s/ LEONARD L. KALISH,  
Counsel for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed July 14, 1950. [305]

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[Title of District Court and Cause.]

COUNTERDESIGNATION OF CONTENTS OF  
RECORD ON APPEAL SUBMITTED BY  
DEFENDANTS-APPELLEES

Defendants-Appellees in the above-entitled action, in conformity with the Federal Rules of Civil Procedure, hereby designate portions of the record and proceedings to be included in the record on appeal on the ground that such additional portions are material and necessary for the determination of the points upon which appellant will rely:

1. Interrogatories Propounded by Defendants Pursuant to Rule 33 of the Rules of Civil Procedure to be Answered Separately and Fully in Writing Within Fifteen Days, filed September 28, 1948.



2. Stipulation Extending Time to Answer Interrogatories Propounded by Defendants and Time to File Answers. [306]

3. Plaintiff's Answers to Interrogatories, filed October 18, 1948.

4. Plaintiff's Interrogatories Propounded to Defendants under Rule 33, filed October 18, 1948.

5. Answer of Defendant Seth D. Perkins to Plaintiff's Interrogatories, filed November 2, 1948.

6. Answer of Defendant George E. Mitzel to Plaintiff's Interrogatories, filed November 2, 1948.

7. Answer of Defendant La Vere Co. to Plaintiff's Interrogatories, filed November 2, 1948.

8. Answer of Defendant Drive-In Theatres of America to Plaintiff's Interrogatories, filed November 2, 1948.

9. Notice of Hearing Upon Plaintiff's Motion for an Extension of Time to Respond to Defendants' Request for Admissions, etc., filed February 23, 1949.

10. Motion for an Extension of Time under Rule 6b(2) to Respond to Defendants' Request for Admissions, filed February 23, 1949.

11. Defendants' Memorandum in Opposition to Plaintiff's Motion for an Extension of Time, filed March 1, 1950.

12. Points and Authorities in Support of Defendants' Motion for Summary Judgment, filed January 4, 1950.

13. Memorandum in Support of Defendants' Motion for Summary Judgment, filed January 31, 1950.

14. Memorandum in Reply to Plaintiff's Affidavits Filed in Opposition to Defendants' Motion for Summary Judgment, filed February 23, 1950.

15. Defendants' Memorandum in Response to Plaintiff's Objections to Proposed Findings of Fact, Conclusions of Law and Judgment, filed April 12, 1950.

16. Summary Judgment and Decree, entered April 14, 1950.

17. Each of the United States Letters Patent (Exhibit B1 to Exhibit B13, inclusive) referred to and made a part of the Motion for Summary Judgment, filed December 22, 1949.

18. This Counterdesignation.

JOHNSON & LADENBERGER,

By /s/ DON A. LADENBERGER,

/s/ C. A. MIKETTA,

Attorneys for Defendants-  
Appellees.

Receipt of copy acknowledged.

[Endorsed]: Filed July 20, 1950. [308]

[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 313, inclusive, contain the original Complaint; Defendants' Interrogatories; Stipulation and Order Extending Time to Answer Interrogatories, etc.; Plaintiff's Answers to Interrogatories; Plaintiff's Interrogatories; Separate Answers of Seth D. Perkins, George E. Mitzel, La Vere Co. and Drive-In Theatres of America to Plaintiff's Interrogatories; Answer; Defendants' Request for Admissions; Plaintiff's Response to Part of Defendants' Request for Admissions; Plaintiff's Objections to Part of Defendants' Request for Admissions; Notice of Hearing on Motion for Extension of Time to Respond to Defendants' Request for Admissions etc.; Motion for Extension of Time to Respond to Defendants' Request for Admissions; Defendants' Memorandum in Opposition to Plaintiff's Motion for Extension of Time; Order Upon Plaintiff's Objections to Defendants' Request for Admissions; Plaintiff's Answer to Defendants' Request for Admissions numbered 15; Motion for Dismissal and Affidavit in Support; Motion for Summary Judgment and Affidavit and Exhibits in Support; Points and Authorities in Support of Motion for Summary Judgment; Memorandum in Support of Motion for Summary Judgment and Affidavits in Support;

Affidavits of Samuel Herbert Taylor, Jr. and A. C. Boyle in Opposition to Motion for Dismissal etc.; Memorandum in Reply to Plaintiff's Affidavits in Opposition to Motion for Summary Judgment; Memorandum Decision; Objections to Proposed Findings of Fact, Conclusions of Law and Judgment; Defendants' Memorandum in Response to Plaintiff's Objections to Proposed Findings of Fact etc.; Findings of Fact and Conclusions of Law; Summary Judgment and Decree; Notice of Appeal; Two Orders Extending Time to Docket Appeal; Statement of Points on Appeal and Two Designations of Record on Appeal and full, true and correct copies of Minute Orders Entered December 19, 1949 and April 12, 1950, and of the Docket Entries which constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$4.05 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 27th day of July, A.D. 1950.

EDMUND L. SMITH,  
Clerk.

[Seal] By /s/ THEODORE HOCKE,  
Chief Deputy. [309]

[Endorsed]: No. 12627. United States Court of Appeals for the Ninth Circuit. Park-In-Theaters, Inc., a corporation, Appellant, vs. Seth D. Perkins, George E. Mitzel, La Vere Co., a corporation and Drive-In-Theatres of America, a corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed July 29, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

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United States Court of Appeals  
for the Ninth Circuit

Appeal No. 12,627

PARK-IN THEATRES, INC.,

Plaintiff-Appellant,

vs.

SETH D. PERKINS, GEORGE E. MITZEL,  
LA VERE CO., a California Corporation,  
and DRIVE-IN THEATRES OF AMERICA,  
a California Corporation,

Defendants-Appellees.

APPELLANT'S STATEMENT OF POINTS  
UNDER COURT RULE 19(6)

Now comes appellant, by its attorneys, and, in accordance with the provisions of Rule 19(6) of



this Court, submits the following as a statement of points on which it intends to rely:

1) The District Court erred in holding, in its Memorandum Decision filed March 27, 1950 [272]\*,

a) that Hollingshead patent 1,909,537 in suit “is invalid for the reason stated by the United States Court of Appeals for the First Circuit, 174 F.2d 547” [272] instead of making its own independent determination of the question of validity), and [311]

b) that Hollingshead patent 1,909,537 in suit “is invalid as a matter of law, for lack of invention over the prior-art” [272], and

c) that Hollingshead patent 1,909,537 in suit “is invalid for the reason it fails to define and claim invention in such full, clear, concise and exact terms as are required by 35 U.S.C.A., Sec. 33 (Rev. Statutes 4888)” [272], and

d) that Hollingshead patent 1,909,537 in suit “is invalid in that functional language has been used” [272].

2) The District Court erred, in its Order filed April 12, 1950 [284],

a) in overruling plaintiff’s objections to defendants’ proposed Findings of Fact 4-9, inclusive and proposed Conclusion of Law 5 and proposed inclusion of attorney’s fees [284], and

b) in holding that additional suggested findings

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\*This refers to the pages of the original certified record herein.

10 and 11 be made a part of the Findings of Fact [284], and

c) in allowing attorney's fees in the sum of \$3400 [284].

3) The District Court erred in its Findings of Fact and Conclusions of Law, as filed April 14, 1950 [285], in the following respects:

a) the last sentence of Finding 3 [286] is improper (and deprives plaintiff-appellant of its right to obtain an independent adjudication of validity in the District Court)

b) the last sentence of Finding 4 [286] is erroneous and is not supported in the showing made to the Court

c) Finding 5 [287] is erroneous and is not supported in the showing made to the Court [312]

d) Finding 6 [287] is erroneous and is not a proper Finding of Fact and, instead, merely sets forth counsel's conclusions and interpretations of the disclosures of certain patents and publications which speak for themselves

e) Finding 7 [288] is erroneous and is not a proper Finding of Fact and, instead, merely sets forth counsel's conclusions and interpretations as to the definiteness and sufficiency of the claims in suit, which claims speak for themselves

f) Finding 8 [288] is erroneous and is not a proper Finding of Fact and, instead, is simply counsel's opinion as to the factors affecting visibility of a motion picture screen (in the nature of a hypothetical discussion having no foundation in

the showings made to the Court) and counsel's conclusions and opinion as to the adequacy of disclosure and definiteness of claims of the patent in suit

g) Finding 9 [289] is erroneous and is not a proper Finding of Fact and, instead, is merely counsel's conclusions and interpretations of the claims of the patent in suit

h) Finding 10 [289] is erroneous and is not a proper Finding of Fact and, instead, is merely counsel's conclusion and opinion as to affidavits which speak for themselves

i) Finding 11 [289] is erroneous and is not supported in the showings made to the Court

j) Conclusion 3 [289] is erroneous and is not supported by the showing made to the Court and is improper insofar as it attempts to adjudicate the validity of Hollingshead patent 1,909,537 with respect to those claims which were not in suit [313]

k) Conclusion 4 [289] is erroneous and is not supported in the showing made to the Court and is improper insofar as it attempts to adjudicate the validity of Hollingshead patent 1,909,537 with respect to those claims which were not in suit

l) Conclusion 5 [290] is erroneous and is not supported in the showing made to the Court and is improper insofar as it attempts to adjudicate the validity of Hollingshead patent 1,909,537 with respect to those claims which were not in suit

m) Conclusion 6 [290] is erroneous and is not supported in the showing made to the Court and is improper insofar as it attempts to adjudicate the

validity of Hollingshead patent 1,909,537 with respect to those claims which were not in suit

n) Conclusion 7 [290] is erroneous and is not supported in the showing made to the Court and is improper insofar as it attempts to adjudicate the validity of Hollingshead patent 1,909,537 with respect to those claims which were not in suit

o) Conclusion 8 [290] is erroneous and is in conflict with the well settled principle that a District Court should decide all issues going to infringement as well as validity so that, in the event that its decision on validity is reversed on appeal, there will be no need to send the case back for trial on the issue of infringement

p) Conclusion 9 [290] is erroneous insofar as it awards attorney's fees in the sum of \$3400, and is not supported by the showing made to the Court, and without having afforded plaintiff any opportunity to examine the attorneys in open Court as to their claimed fees, and is in conflict with the well settled principle [314] that attorney's fees are not awarded in ordinary patent cases and in the absence of unusual circumstances (such as were not shown to be present in the case at bar)

4) The District Court erred in entering summary judgment [291] holding the patent in suit invalid (in the absence of any fully anticipatory prior-art) without affording plaintiff an opportunity to prove its case (independently of the decision of the First Circuit) by a full and complete trial on the merits.

5) The District Court erred in awarding defendants attorney's fees in the sum of \$3400 [293] in the complete absence of any showing of unusual circumstances justifying the award of any attorney's fees whatever and in the complete absence of any factual showing as to the nature and extent of the services rendered by defendants' attorneys (other than a mere statement as to the total amount of services billed and to be billed, but without any breakdown as to the time spent, to justify the size of the fees claimed).

LYON & LYON,

/s/ LEONARD S. LYON,

/s/ REGINALD E. CAUGHEY,

Attorneys for Plaintiff-  
Appellant.

/s/ LEONARD L. KALISH,

Counsel for Plaintiff-  
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed August 9, 1950.



